DISTRICT ATTORNEY
COUNTY OF NEW YORK
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New York, N. Y. 10013
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ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

March 2, 2023

Re: Letter of Recommendation for Javon Henry

Dear Sir or Madam:

I write this letter in the strongest support of Javon Henry's application to join your office. I was Mr. Henry's direct supervisor during his employment at the New York County District Attorney's Office, and I watched him successfully navigate the prosecution and investigation of his cases, conduct hearings, presentations to the Grand Jury, and hundreds of witness interviews. In all that time, Mr. Henry has always been the model of a true public servant and a true attorney. He always did his best to leave a positive impact on people's lives, and to restore a sense of justice and security to crime victims and their communities.

I hold the supervisory role of Deputy Bureau Chief of Trial Bureau 30, where I supervise approximately forty Assistant District Attorneys in their daily work of prosecuting a variety of criminal cases. Our attorneys are expected to handle a case from its inception to its conclusion, meaning from the moment an arrest is made, until the moment the case is resolved. This requires that they review the facts of an arrest, decide whether criminal charges are appropriate, interview witnesses, develop evidence, conduct all litigation, including bail hearings, grand jury presentations to seek indictments, motion practice, evidentiary hearings, and the trial itself. Our attorneys are expected to balance the investigative and discovery needs of each of these cases, as well as the witness needs of each one. They must at the same time be sensitive to the very specific trauma – and in many cases the very violent trauma – that our witnesses have suffered. The work requires a tremendous amount of advocacy, skill, and dedication.

Mr. Henry was always able to handle these demands gracefully and professionally. He is a phenomenal attorney, and he is fearless in the courtroom. He has handled cases in subjects that include domestic violence, robberies, assaults, gun possession, stabbings, and he has conducted hearings in all manners of crimes. Mr. Henry captivated Grand Jurors, and his supervisors, with his energetic and well-prepared examinations of witnesses. His work reflected a deep connection to our crime victims and witnesses in a way that made them feel comfortable in the courtroom. He also always demonstrated strong analytical skills in doing so, a necessity in our work,

where we are expected to establish facts and truth in the face of often difficult and uncooperative witnesses. He has always risen to the occasion of this very demanding work, its need for fine organizational skills, the ability to handle multiple court-imposed and statutory-imposed deadlines, and the ability to react quickly to fast changing events that occur in court.

Mr. Henry is also very collaborative and worked well with our more senior attorneys, who often provide junior attorneys with guidance. He was always very attentive and respectful in incorporating the advice given to him by senior staff, in following my directions, and in inspiring the same among his classmates. His work ethic is tremendous.

Mr. Henry has a high level of understanding of New York Penal Law and Criminal Procedural Law, and the surrounding body of case law. He made creative and intelligent arguments about the relevancy of evidentiary issues prior to trial, presented strong writing skills with his post-judgment motion practice and search warrant practice, and was always prepared with research and persuasive reasoning prior to the start of any proceeding.

Most importantly, Mr. Henry understands that being an attorney means always using your law degree for good – always helping those in need. As a result, he spent nearly every workday in the courtroom during his tenure here, and in doing that he met with and consoled a countless number of crime victims, helped struggling families enter counseling, ensured that abused children and victims of domestic violence escaped dangerous homes and restarted their lives anew, enrolled drug addicts in treatment programs, and held violent offenders responsible for the social and physical harm they caused others. He embodies what it means to be a prosecutor: To speak up for those who cannot speak for themselves, and to ensure justice and fairness for every person in this country, whether they are the victim, the witness, or the accused.

I am pleased to recommend Mr. Henry without any hesitation or reservation. He will bring enthusiasm, leadership, and professionalism to your office

Please feel free to contact me if I can be of further assistance.

Sincerely,

Shira Arnow

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ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

October 26, 2022

To whom it may concern:

I am writing this letter to recommend Javon Henry for a position as a law clerk. I am currently the Chief of the Elder Abuse Unit at the New York County District Attorney's Office ("the Office"), and prior to that I served as the Deputy Chief of the Domestic Violence Unit for the past twelve years. It was in the latter capacity that I worked with Mr. Henry since he began his tenure at the Office.

As a supervisor, I have sat in on interviews conducted by Mr. Henry in domestic violence cases he has prosecuted, consulted with him extensively on his cases and reviewed his written work for a substantive motion addressing a recently enacted New York State law. Mr. Henry has handled not only a significant number of domestic violence cases, but also several rather complicated matters, including cases where the victim was not cooperative and cases where there was significant injury. In one case, the individual who filed the initial complaint with the police was in fact making false allegations with the police and our state's child protective services. It was not evident on the face of the complaint that it was false. Mr. Henry did excellent investigative and analytical work. He followed the evidence, kept an open mind and pushed forward for the right result, which ultimately was a dismissal of the charges.

The memorandum of law that Mr. Henry wrote addressing a post-conviction application for resentencing pursuant to the newly enacted Domestic Violence Survivor's Justice Act was complex. It required a close reading of the record, a review of other recent lower court decisions and a review of the legislative history. He was not deterred by the research or work necessary to grapple with the issues and was mindful of the precedent that it could set. The memorandum was thorough, addressed unsettled questions of law, and the court adopted Mr. Henry's reasoning in rejecting the defendant's application.

Mr. Henry is easy to work with. He is consistent and prompt in his contact with his supervisors about his progress on his cases and any new developments that might affect the Office's treatment of a matter. He is thorough and asks appropriate

questions. His follow up is excellent and I consider him a valuable member of our team. I have enjoyed working with him and will regret losing him. If you have any questions, please feel free to reach me at 212-335-4219 or at launayj@dany.nyc.gov.

Sincerely,

Jeanine Launay

Jeanine M. Launay
Chief, Elder Abuse Unit

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WRITING SAMPLE

This writing sample is a first draft opinion I submitted to the Hon. Ellen Gesmer during my clerkship. This first draft opinion is my own work product and has not been edited by any other person. Judge Gesmer also gave me permission to use this as a writing sample.

We reverse defendant's conviction because the trial court's ruling on the People's *Molineux* application deprived defendant of a fair trial because the evidence admitted was solely relevant to defendant's propensity to commit a crime.

Facts

On April 11, 2018, defendant was released to parole supervision after his conviction for attempted criminal possession of a weapon in the second degree. On July 6, 2018, parole supervision issued a warrant for defendant's arrest because defendant failed to comply with the terms of his parole.

On July 16, 2018, at approximately 2:50 p.m., a detective and an officer were both in uniform and sitting in a marked police car when they observed defendant on the street. The detective was aware of defendant's prior firearm conviction and the parole warrant for his arrest. From approximately 10 feet away, the detective saw a bulge in defendant's right pocket, which he later testified was "indicative of a firearm." The detective exited the car to arrest defendant, who ran away. The detective and the officer pursued him, while the detective requested backup over the radio, stating that defendant might be armed.

During the chase, defendant ran into two buildings, for which he was later charged with burglary. In response to the detective's radio transmission that defendant might possess a firearm, approximately 100 officers responded to the location and assisted in searching for and arresting defendant. Defendant was arrested but no firearm was recovered. Defendant was charged with second-degree burglary, third-degree burglary and resisting arrest.

Before the trial, the People made a *Molineux* application (*People v Molineu*x, 168 NY 264, 291–92 [1901]) to admit evidence of defendant's prior firearm conviction at trial. The People asserted that this would provide necessary context to explain: (1) the basis for the

detective's belief that defendant possessed a firearm; and (2) the extraordinary police response. Defendant opposed the application, arguing that evidence of his prior conviction would do nothing to explain the police response, given that there was no evidence that any of the 100 officers that arrived to arrest defendant were aware of his prior conviction. Defendant further asserted that the prior gun conviction was old and had no connection to his parole arrest. Finally, defendant noted that the People would still be able to present evidence about defendant's parole and the bulge in defendant's pocket that the detective had observed, although, defendant argued, if they did so, he "thinks" and "believe[s]" he should be able to present evidence challenging the detective's credibility because "the People would be free to argue [i]n their summation" that the "bulge. . . and [defendant's] running" were a valid basis for the detective's belief that defendant was armed.

Ultimately, the motion court granted the People's *Molineux* application to the extent of permitting them "to elicit brief . . . testimony about the defendant's prior conviction for attempted criminal possession of a weapon in the second degree." The motion court further permitted "defendant to raise the issue of the propriety of police action." The court reasoned that *People v Santana* allowed the People "to explain police actions, since the court allowed the defendant to raise an issue as to the propriety of the police conduct" (16 AD3d 346, 346 [1st Dept 2005], *lv denied* 5 NY3d 794 [2005]).

At trial, the prosecutor mentioned defendant's conviction in his opening statement and summation, and the detective testified about it during direct examination. Defendant did not present any evidence at trial. The trial court instructed the jury that evidence regarding defendant's prior gun conviction "must not be considered for the purpose of proving that

defendant had a propensity . . . to commit the crime charged in this case. It was offered as background information . . . about why [the detective] took his course of action."

Analysis

Evidence of prior crimes cannot be admitted to show that a defendant possesses the propensity to commit the crime charged (*Molineux*, 168 NY at 291–92). Evidence of a prior crime may be admissible when it is relevant to a specific material issue in the case other than defendant's criminal propensity including, but not limited to, motive, intent, absence of mistake or accident, common scheme or plan, and identity of the person charged (*People v Dorm*, 12 NY3d 16, 19 [2009]).

In addition, *Molineux* evidence may be admissible as "necessary background material when relevant to a contested issue in the case . . . or to complete the narrative of the events . . . if such evidence is 'inextricably interwoven' with the crime charged" (*People v Foster*, 295 AD2d 110, 112 [2002] *lv denied* 98 NY2d 210 [2002] [internal citations omitted]; *see People v Wright*, 160 A.D.3d 667, 668 [2d Dept 2018] *lv denied* 31 NY3d 1154 [2018][applying this exception to a firearm conviction]); *see also People v Resek*, 3 NY3d 385, 390 [1st Dept 2004] [*Molineux* evidence may be admissible to assist jury to "sort out ambiguous but material facts"]), provided that it is not "unnecessary to the People's case . . . or merely cumulative" (*People v Ely*, 68 NY2d 520, 529–30[1986]). "This exception is generally applicable where there is some need to . . . flesh out the narrative so that there are no gaps in the story line . . ." (*People v Leonard*, 29 NY3d 1, 4 [2017]). Whether evidence of a prior crime is relevant to a specific material issue other than propensity is a question of law, not discretion (*People v Alvino*, 71 NY2d 233, 242 [1987]).

If the court finds that it is materially relevant, "admissibility turns on the discretionary balancing of the probative value and the need for the evidence against the potential for delay, surprise and prejudice" (*id.* [internal citation omitted]; *see also Dorm*, 12 NY3d at 19). Determining whether to admit *Molineux* evidence for the purpose of background or narrative completion "is a delicate business, and there is the danger that [the evidence] may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value" (*Resek*, 3 NY3d at 389). The court must begin with the premise that such evidence is inadmissible. Even if the court determines that the proffered evidence could clarify a relevant fact to the jury, before admitting it, the court must determine that "there was no ambiguity that could not have been easily dealt with by far less prejudicial means" (*Resek*, 3 NY3d at 390). This balancing is reviewed for abuse of discretion (*Alvino*, 71 NY2d at 241). However, if defendant "opens the door" to *Molineux* evidence, the court need not find that it is relevant to a material non-propensity issue in the case or that its probative value outweighs any potential prejudice to admit a prior bad act (*People v Rojas*, 97 NY2d 32, 36–39 [2001]; *see also People v Swaby*, 2 AD3d 104, 104 [1st Dept 2003]).

Here, the motion court improperly admitted evidence that defendant was previously convicted of second-degree attempted criminal possession of a weapon to explain the detective's actions on the day defendant was arrested. The motion court failed to follow the necessary *Molineux* steps: determine first whether the evidence is relevant to a material issue, and then, if so, whether its probative value outweighs any potential prejudice to defendant. Instead, the court improperly relied on *Santana*, which does not apply here because defendant never opened the door.

In *Santana,* the motion court denied the prosecutor's application to admit defendant's criminal history for the purpose of explaining the high-speed car pursuit and arrest of defendant unless defendant "opened the door" (*see Santana v Artus,* 2009 US Dist Lexis 126828 at *4–12[SD NY 2009]).[1] In light of that ruling, defense counsel "opened the door" by cross examining the People's witnesses concerning the propriety of the police conduct in the arrest of defendant (*id.*). The trial court then allowed the prosecution to introduce limited information about the defendant's criminal history in order to refute defendant's contentions concerning defendant's arrest process (*id.*; *Santana*, 16 AD3d at 4).

In contrast, here, *Santana* does not apply because defendant did not "open the door." The court erred by granting the People's application before defendant's opportunity to raise any issues as to the propriety of the officers' conduct or the detective's belief defendant was armed (*see Resek,* 3 NY3d at 390 ["if defendant had placed the propriety of the police action in issue, the events leading up to his arrest ought properly have been admitted to rebut the claim"]; *Foster*, 295 AD2d at 113 [finding an error to admit circumstantial evidence of uncharged pickpocketing theft solely to complete the narrative of what led up to defendant's arrest; defense did not challenge officer's credibility or propriety of arrest]).

Contrary to the People's assertion, defense counsel's pretrial announcement that he should argue the propriety of police actions or the detective's credibility was not opening the door because counsel did not make an affirmative declaration to do so. Rather, defense counsel only stated that he "thinks" and "believe[s]" he might be permitted to discredit the detective under the limited condition that the People would bolster the detective's credibility with evidence of defendant's "bulge . . . and [his] running" and not his prior conviction. The motion

[1] The nature of the trial court's ruling is explained in the decision on *Santana*'s habeas corpus petition.

court allowed defendant to raise the issue of the police actions and granted the People's application to introduce defendant's prior gun conviction.[2] The record does not reflect that defense counsel stated that he would challenge the officers' response or the detective's credibility regardless of the admission of defendant's prior gun conviction nor did the motion court clarify defendant's position. In other words, the motion court's ruling tied defendant's hands by depriving him of his trial choice. It is improper for a trial court to require or indirectly require defendant to challenge the veracity of a witness or the propriety of the police actions here (*see generally People v Ellis*, 62 AD2d 469, 471 [1st dept 1978]["It is not for the Trial Justice, no matter how well motivated, to usurp the role of counsel for either side in a criminal trial because of the court's conception as to how the case should be presented"]; *see also People v Helms*, 243 AD 818, 818 [2d 1935][reversing defendant's conviction on the ground that defendant was improperly prevented from presenting the testimony of character witnesses]). To read *Santana*, as the prosecution does, to stand for the proposition that a defendant's criminal history is automatically admissible in cases involving pursuit when an officer's knowledge of defendant's criminal history plays a part in justifying the pursuit vitiates the requirement that the court must first determine whether the proffered evidence is both relevant to a specific material issue and necessary, rather than merely cumulative and/or prejudicial. Instead, *Santana* is consistent with other cases in which a defendant's trial strategy opens the door to the admission of *Molineux* evidence as an appropriate and necessary response (*see, e.g., Rojas*, 97 NY2d at 36–39 [in prosecution for assault on a prison guard, the court held that defendant opened door to evidence of his prior assault on an inmate when he used the court's initial exclusion of that evidence as a

[2] The People improperly bolstered the credibility of detective before he was challenged. "It is a basic principle of the law of evidence that a witness's credibility may not be propped or bolstered unless the witness has first been impeached" (*People v Valdez*, 53 A.D.3d 172, 174[1st Dept 2008]).

"sword," by mischaracterizing the purpose of his being held in solitary confinement]; *see also Swaby*, 2 AD3d at 104; *People v Castaneda*, 173 AD 2d 349, 350 [1st Dept 1991]["Evidence of uncharged criminal or immoral conduct may be admitted as part of the People's case on rebuttal if it has a tendency to disprove a defense raised by defendant."]). Had the trial court properly relied on *Santana*, it would have given a conditional ruling, as the *Santana* court did, and directed that the *Molineux* evidence was inadmissible unless and until defendant challenged the detective's credibility or the propriety of the officers' conduct at trial.[3]

Even if defendant did not open the door, the evidence of his prior conviction was not relevant to a material non-propensity issue and its probative value was minimal and did not outweigh the prejudice to defendant. First, defendant's prior gun conviction was not inextricably intertwined with the charged offense. It was not close in temporal proximity with, and had no connection at all to, the offense at issue in this case (*see People v Morris*, 21 NY3d 588, 596–97 [2013][affirming the admission of evidence of a recent 911 call reporting that someone matching defendant's description had recently completed a gun point robbery to complete the narrative regarding circumstances of the defendant's capture]; *People v Tosca*, 98 NY2d 660, 661[2002]["trial court did not abuse its discretion in admitting the police officers' testimony concerning an unidentified cab driver's report of a recent encounter with the armed defendant" because it explained why the police pursued and confronted the defendant]; *People v Till*, 87 NY2d 835, 837 [1995]["closely antecedent, uncharged robbery" established a "motive for defendant's attempt to kill or assault the [police officer] to avoid capture and punishment"]). Because it was not inextricably intertwined, the prior gun conviction has a low probative value.

[3] The People could have also waited for the defendant to open the door during opening or cross examination of the detective.

Second, defendant's prior gun conviction is not necessary as background information or to complete the narrative and has a low probative value because there was other, less prejudicial, evidence the People could and did present that explained that the officers were required to arrest defendant and that explained a reasonable basis for the detective's belief that defendant was armed (*see Resek*, 3 NY3d at 390 [holding instead of allowing the jury to hear prejudicial evidence that defendant was initially surveilled by police for possessing a stolen car—charges the grand jury dismissed—to explain what led to his arrest, trial court should have simply instructed the jury that the arrest was lawful and not to speculate as to its reasons]; *Leonard*, 29 NY3d at 4 [holding that since the victim already testified that defendant was a relative who sporadically stayed in her family's home and that she went to defendant's house to drink alcohol; therefore, "introduction of the prior alleged assault was not necessary to clarify their relationship or to establish a narrative of the relative event"]). Specifically, the People presented testimony about defendant's parole arrest warrant, and the detective testified that he observed a bulge in defendant's pocket that was consistent with the shape of a firearm. The People also submitted to the jury a picture depicting the bulge. Without defendant's prior gun conviction, the jury would not speculate that the officers wrongfully pursued defendant because of the other evidence. Defendant's prior gun conviction served no additional purpose except exposing the jury to prejudicial evidence. Therefore, the prior gun conviction is unnecessary because it is cumulative, which also militates in favor of attributing a low probative value.

Third, the prior conviction is highly prejudicial. First, there is a large risk that the jury could use defendant's gun conviction to conclude that defendant is a person of bad character and, therefore, is guilty of his charged crimes (*see Alvino*, 71 NY2d at 241). Second, there is a higher risk of undue prejudice because defendant's prior gun conviction is more severe than the charged

burglary since it involved a loaded firearm (PL §§ 110/265.03[Attempted Criminal possession of a Weapon]; CPL § 1.20[41][a][defining armed felony]). Third, there is a higher risk that the jury might tangle the facts of the *Molineux* evidence with the facts of the charged offense. The jury might improperly use defendant's prior gun conviction to conclude that defendant actually possessed a gun and not exclusively to credit the detective's belief that defendant possessed a firearm. The jury could have viewed the presence of a gun when defendant entered the residence as more deserving of punishment because it would assist with establishing defendant had the requisite intent to commit a crime therein (PL § 140.25).

Additionally, the way the People used defendant's prior conviction is also prejudicial. The People sought to prove that the detective's belief was justified that defendant possessed a gun in their initial encounter, which requires propensity—because defendant had a gun two years ago, he likely had one in their encounter. Although defendant's prior gun conviction is not propensity for his charged conduct, the prior gun conviction is prejudicial because the People implicitly coached the jury to utilize propensity. The prosecutor argued during closing "it was reason[able] for [the detective] to think that [defendant] might have had a firearm . . . he knew about the prior firearm." This might have confused the jury because in one instance the court instructed the jury not to use propensity to convict, while the People implicitly urged the jury to use propensity to credit the detective's belief. Under these circumstances, the prejudice to defendant outweighed the probative value of the evidence of defendant's prior gun conviction.

The trial court's limiting instructions to the jury did not cure the prejudicial effect of the prior gun conviction. Even when limiting instructions have been provided, convictions have been reversed "where the probative value of the uncharged crime was considered substantially outweighed by the prejudicial effect" (*Peope v Fiore*, 34 NY2d 81, 84 [1974]; *see Foster*, 295

AD2d at 113 [finding the curative instruction insufficient because the prior bad act was overly prejudicial compared to its probative value]). As argued above, the probative value of the evidence is substantially outweighed by the prejudicial value.

The evidence the People presented was not overwhelming to prove all of the elements of the charged conduct. Under burglary, the People have the burden to prove beyond a reasonable doubt that defendant entered the building with "intent to commit a crime therein" (PL § 140.20; PL § 140.25). Because defendant ran into an apartment then immediately ran out, it is not immediately clear that defendant entered that premises for the purpose of committing a crime therein (*see generally In re William A.*, 4 AD3d 647, 649 [3d Dept 2004] [finding unlawful entry alone insufficient to establish the juvenile's commission of burglary because it did not establish that he effectuated entry with the intent to commit a crime therein]).

Contrary to the People's argument, defendant was not required to object each time defendant's prior conviction was mentioned or to both of the court's limiting instructions because defendant made a clear objection during the pre-trial motion *in limine*. "[A] lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected" (*People v Finch*, 23 NY3d 408, 413 [2014]). During the pre-trial motions *in limine*, defense counsel presented a comprehensive argument in opposition to the prosecutor's motion to admit defendant's gun conviction.[4]

[4] The People's reliance on *People v Smith* is misplaced. In *Smith* "defendant . . . failed to object to the testimony in question or otherwise make his position known after the court made no ruling on the prosecution's motion for a prospective ruling with respect to [uncharged crimes] testimony" (*People v Smith*, 221 AD2d 251, 251 [1st Dept 1995]). Here, in contrast, during the pretrial motion *in limine*, defense counsel made a clear indication that he objected to the admission of defendant's prior gun conviction.

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WRITING SAMPLE

This writing sample is a legal memorandum I submitted to the Hon. Ellen Gesmer during my clerkship. This memorandum is my own work product and has not been edited by any other person. Judge Gesmer also gave me permission to use this as a writing sample.

Factual Background

Defendant was charged with a single count of criminal sale of a controlled substance in the third degree (PL § 220.39[1]).

On February 11, 2017, at about 4:44 p.m., near 508 West 41st Street in Manhattan, defendant sold crack-cocaine to an undercover officer ("UC"). Police recovered $20 in pre-recorded buy money from defendant's pants pocket along with a cell phone and other cash. According to the felony complaint, the UC called defendant beforehand to arrange the sale. According to the voluntary disclosure form, the arrest occurred at 4:44 p.m., the same time as the sale, and the UC made a confirmatory identification of defendant.

The Motion to Suppress

As part of his omnibus motion, defendant moved to suppress the money and the cell phone recovered from his pants pockets at the time of his arrest, or, in the alternative, for a Mapp/Dunaway hearing on whether the police had probable cause to arrest and search him. Defense counsel averred that the People had failed to provide police reports and other material necessary to assess the suppression issues, and that counsel lacked basic information about the officers' basis for searching defendant. Counsel alleged that at the time of his arrest, defendant was walking on West 41st Street, and that he had not engaged in any observable unlawful behavior when the police officer approached him or in the period before he was arrested. Counsel averred that defendant's clothing and appearance did not differ from others in the vicinity and did not sufficiently match any description to justify his arrest and seizure.

The People opposed defendant's motion to suppress the physical evidence. In their affirmation, the People averred that immediately after the sale, the UC radioed the field team and provided a description of defendant, and the field team arrested defendant "minutes later" based

on the description the UC provided. The People averred that they had provided defendant with the information to which he was entitled. The People argued that defendant's suppression motion should be denied without a hearing.

The motion court denied defendant's motion to suppress the physical evidence. The court found that the motion failed to controvert the factual basis for the arrest and failed to provide any other basis for suppression. The court found that because defendant did not deny participating in the drug sale, his allegations about his conduct at the time of the seizure were insufficient to contest the factual predicate for the arrest, which was the sale itself.

Discussion

Defendant contends that he raised a sufficient factual dispute to warrant a *Mapp/Dunaway* hearing on whether there was sufficient probable cause for his arrest and search. He argues that his allegations were sufficient to do so based on the limited evidence disclosed to him by the People and the discrepancies between the People's omnibus response and the VDF about the time of the arrest. Accordingly, defendant contends that his plea should be vacated and the case remanded for a Mapp/Dunaway hearing.

The People assert that the motion court's summary denial of defendant's motion was proper because defendant's generalized statements did not raise a sufficient factual dispute, as he did not deny taking part in the sale or contest the People's contention, in the complaint, that the UC had arranged the sale with defendant on the phone.

It is submitted that the motion court correctly summarily denied defendant's motion to suppress physical evidence because defendant failed to plead sufficient information in his motion papers.

Under Criminal Procedure Law § 710.20, a person who is "aggrieved" by an illegal search and seizure is authorized to move to suppress any evidence seized as a result of the illegality. A defendant seeking suppression of evidence has the initial burden of showing sufficient grounds for the motion based on sworn allegations of fact, in his moving papers (CPL § 710.60[1]; *People v Jones*, 95 NY2d 721, 729 [2002]).

To be granted a suppression hearing, the defendant must establish in his papers "a factual dispute on a material point" (*People v Mendoza*, 82 NY2d 415, 426 [1993]).[1] "[C]onclusory allegations of a general constitutional violation or lack of probable cause are of no avail in meeting the requirements for entitlement to a hearing" (*Jones*, 95 NY2d at 726). "[T]he sufficiency of a defendant's factual allegation should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, (3) and defendant's access to information" (*Mendoza*, 82 NY2d at 426).

The less information a prosecutor discloses, the less specific a defendant is required to be in his moving papers (*see People v Bryant*, 8 NY3d 530, 530 [2007]*; see also People v Esperanza*, 203 AD3d 124, 131 [1st Dept 2022][finding defendant not required to provide a specific affirmation to be granted a hearing because the prosecutor did not disclose the narcotics obtained during a warrantless entry of defendant's apartment]).

In the context of a buy-and-bust situation, there are two ways, as relevant here, in which a defendant can make a sufficient pleading to be granted a *Mapp* hearing.

[1] When a defendant files a motion to suppress tangible evidence, a court is presented with three courses of action. First, a court must summarily deny the motion without a hearing if the motion papers fail to allege a ground constituting either a legal basis or sworn allegations of fact that support the ground alleged (CPL §§ 710.60[3][a], [b]). Second, a court must summarily grant the motion without a hearing if the "people concede truth of the allegations of fact" or the "people stipulate that the evidence sought to be suppressed will not be offered in evidence" (CPL § 710.60[2]). Third, if the court cannot summarily deny or grant the motion, "it must conduct a hearing and make findings of fact" (CPL § 710.60[4]). And regardless of whether a hearing occurred, the court must set forth its findings of fact, conclusions of law, and its reasons on the record (CPL § 710.60[6]).

1. Denying participation in the drug transaction

The court properly denied defendant's *Mapp* hearing because defendant did not sufficiently state in his motion papers that he did not engage in the underlying drug transaction.

In a buy-and-bust, the defendant can "deny participating in the [underlying] transaction" (*id.* at 429). Because the probable cause stems from the underlying drug transaction, a defendant's statement about his conduct after the transaction and before his arrest has no bearing because it does not address the prior drug sale (*Jones*, 95 NY2d at 726). Thus, "factual allegations of innocent conduct at the time of arrest do not mandate a hearing" (*Jones*, 95 NY2d at 726).

In *Jones* and *Martinez*,[2] both defendants moved to suppress physical evidence obtained from an arrest after a buy-and-bust operation (*Jones*, 95 NY2d at 723; *Mendoza*, 82 NY2d at 422). In both motion papers, defense counsels affirmed that after the underlying drug transaction and before the arrest the defendants were not engaged in any criminal activities (*Jones*, 95 NY2d at 723; *Mendoza*, 82 NY2d at 422). In *Jones*, defense counsel affirmed "defendant was not engaged in any criminal activity at the time of the arrest that would establish separate grounds to stop him" (*Jones*, 95 NY2d at 723). In *Martinez*, defense counsel affirmed "[t]he accused was in a public place acting in a lawful manner . . . [and] [t]here was no reasonable suspicion, *at the time of the stop*, that the accused had committed, was committing, or was about to commit a crime" (*Mendoza*, 82 NY2d at 422). The Court of Appeals in each case found no hearing was required because the defendants failed to challenge the underlying drug transaction (*Jones*, 95 NY2d at 726; *Mendoza*, 82 NY2d at 431–32). It is important to note that *Jones* and *Martinez* did not create a specific language requirement for denying participation in the underlying drug sale.

[2] *Martinez* is one of four cases consolidated in *Mendoza*.

The best way to be entitled to a hearing is to explicitly deny participating in the underlying drug transaction (*People v Lopez*, 263 AD2d 434, 435 [1st Dept 1999] [a "defendant [who] explicitly denied selling or possessing drugs" is entitled to a hearing]). A general statement that the defendant was not engaged in any crime is usually insufficient (*People v Heath*, 139 AD3d 421, 422 [1st Dept. 2016] ["Defendant's conclusory denial of illegal, criminal or suspicious activity *at any time*" was insufficient to establish his entitlement to a hearing, in the absence of any denial that he participated in the alleged drug transaction"]). However, if a defendant stated he generally did not engage in any "drug transaction," he is in a better position to be entitled to a suppression hearing (*People v Rivera*, 42 AD3d 160, 163 [1st Dept 2007] ["defendant's denial that he was not participating in a drug transaction . . . was clearly sufficient to warrant a hearing on his motion"]; *People v Muhammed*, 290 AD2d 248 [1st Dept 2002] [finding a hearing is warranted in an observed drug sale case where defendant "denied selling drugs immediately before his arrest or at any time that day"]). A general statement against committing any crime can be found sufficient when the drug transaction and apprehension occur simultaneously (*People v Bailey*, 218 AD2d 569, 570 [1st Dept 1995]["The [observed] drug transaction and the arrest were nearly simultaneous, such that the defendant's denial that he was 'involved in any suspicious or criminal activity', 'involved in any overt criminal activity,' or that any 'illegal contraband was in such a position to be seen by a police officer' was a denial of purchasing drugs."]).

Here, defendant's motion papers were insufficient to warrant a hearing because defendant did not clearly deny his participation in the underlying drug transaction. Granted, in defendant's motion papers, he does state he "had not engaged in any observable unlawful behavior . . . *in the period preceding the seizure*." However, it is unclear if that period of not being engaged in any

crime includes the underlying buy-and-bust sale. Arguably, it did not include the undercover sale because the rest of the paragraph focused on defendant's innocent conduct moments before his apprehension.[3] Moreover, it is insufficient because it is a general statement that he abstained from crimes (*Heath*, 139 AD3d at 422). The underlying drug transaction and apprehension did not occur simultaneously but rather sequentially (*Bailey*, 218 AD2d at 570).[4] And defendant failed to mention he was not engaged in *any* drug crimes (Rivera, 42 AD3d at 163). Because defendant holds the initial burden to prove there was a factual dispute, there is a presumption for no hearing (CPL § 710.60[1]). Defendant was in a position to provide a clear statement as to whether he was engaged in the drug transaction because he was furnished with sufficient information—the complaint and the Voluntary Disclosure Form, which explained what crime he was arrested for and when the crime took place (*People v Smith*, 180 NYS3d 534, 534 [1st Dept 2023][CSK JKO EG SS JR]["Defendant did not address any of the detailed factual allegations in the felony complaint, which stated that he participated in a drug sale to an undercover officer. . ."]; *People v McFaline*, 167 AD3d 465, 466 [1st Dept 2018]["Defendant's conclusory denial of selling cocaine to an undercover officer did not contradict the felony complaint's allegation that defendant supplied drugs to another person, who sold them to an undercover officer"]; *People v France*, 12 NY3d 790, 791 [2009] [hearing properly denied where defendant had sufficient information from the complaint and VDF but failed to contest basis for arrest]).

2. Asserting the officers relayed an incorrect or faulty description of the defendant

[3] Defendant's motion stated: "[a]t the time of the police intrusion, defendant was walking in the vicinity of West 41st Street. The defendant had not engaged in any observable unlawful behavior at that time and in the period preceding the seizure. There was nothing illegal or suspicious in open view at the time the police approached him."

[4] The record reflects that after the undercover agent purchased the drugs and relayed the information to the other officers, the officers then arrested defendant.

The defendant failed to plead sufficient information in his motion papers regarding a description of himself and the description of other people around him during the time of his apprehension to warrant a hearing.

"Deficiencies in the description furnished to an arresting officer" may provide the basis for suppression (*Jones*, 95 NY2d at 726). The court reasoned that if an arrest is made upon a search warrant applied for by an undercover officer, it requires a description by which a defendant can be identified with reasonable certainty (*id.*). The same requirement must be met in a warrantless arrest when a person is seized pursuant to a communication to the officer (*id.*). When a court is presented with a "warrantless arrest based upon a teletype description of the suspect, a reviewing court must be supplied with the description upon which the police acted and sufficient evidence to make its own independent determination of whether the person arrested. . . reasonably fit that description (*id.*). However, the defendant still has the initial burden "to supply the motion court with any relevant facts he did possess for the court's consideration on the suppression motion once the People disclosed the communicated description" (*id.* at 729). It would be unreasonable to require precise factual averments when a defendant does not have access or awareness of the facts necessary to support suppression (*id*.). At the very least, the defendant is required to "provide a description of his own appearance at the time of the arrest" and a description "as to the presence and general description of such other persons in the vicinity at the time of the arrest" because he has actual knowledge of that information (*id.*). In *Fleming*, although the prosecutor did not disclose the transmitted description, the court found the defendant met the *Jones* standard because he provided a description of himself and those in his vicinity (*People v Fleming*, 201 AD3d 552, 554 [1s Dept 2022][describing a 44 year old black man]).

Here, if we apply *Jones*, defendant's motion papers were insufficient to warrant a hearing because defendant did not provide a description of himself or the appearance of the people around him. Defendant only in a conclusory manner stated that his "appearance was not distinctive and resembled other people in the vicinity."

However, I also strongly disagree with *Jones*. I agree that a search warrant and warrantless search should be held to the same requirements in that they are both required to have a description by which a defendant can be identified with reasonable certainty. However, I think if *Jones* is going to apply the rules of a search warrant to a warrantless search it should fully do so. By initially requiring the defendant to state his own description and those around him, the court is circumventing the clear description requirement. In a search warrant, what the target suspect actually looks like and the others near the suspect is not always relevant. As acknowledged by the court in *Jones*, the suppression hearing would be about whether the relayed description was sufficient (*Jones*, 95 NY2d at 727 ["it is clearly possible to establish the unlawfulness of an arrest based solely upon inadequacy of a description transmitted to the arresting officer"]). "Particularity is required in order that the executing officer can reasonably ascertain and identify. . . the persons or places authorized to be searched and the things authorized to be seized. To protect the right of privacy from arbitrary police intrusion . . . nothing should be left to the discretion of the searcher in executing the warrant" (*People v Nieves*, 36 N.Y.2d 396, 401 [1975]). It is possible for the language of the search warrant to be found unlawful without even knowing the actual description of the defendant and people near the defendant. A description of the defendant compared to other surrounding individuals only becomes relevant when the language is clear on its face and there is someone else that matches the defendant's description. When the prosecutor has not turned over the description, the only

thing the defendant should be expected to affirm is that the officers did not have separate probable cause.

Although I disagree with *Jones*, the court was correct to outrightly deny the defendant's motion.

Applicant Details

First Name	**Charlene**
Last Name	**Hong**
Citizenship Status	**U. S. Citizen**
Email Address	**cch245@cornell.edu**
Address	**Address** Street **211 Maple Avenue, Apt 212** City **Ithaca** State/Territory **New York** Zip **14850**
Contact Phone Number	**615-772-6265**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2017**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 13, 2023**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Langfan Family First-Year Moot Court Competition** **Cornell Law School Moot Court Board** **Philip C. Jessup International Law Moot Court Competition** **Francis P. Cuccia Family Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kelley-Widmer, Jaclyn
jak533@cornell.edu
(607) 255-9898
Blume, John
jb94@cornell.edu
607-255-1030
Awrey, Daniel
aja288@cornell.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

211 Maple Ave, Apt 212, Ithaca, NY 14850
615-772-6265 | cch245@cornell.edu

June 12, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a one-year clerkship in your chambers for the 2025-26 term. I just graduated from Cornell Law School, where I served as an Articles Editor for the *Cornell Law Review* and as the head of the Moot Court Board. I spent the past summer as a summer associate at Wachtell, Lipton, Rosen & Katz, and I will start there full time as a litigation associate this October.

In law school, I was committed to increasing diversity in the legal profession and creating mentorship opportunities for Asian American law students through my involvement as a co-chair of the Asian American Bar Association of New York's Student Outreach Committee. Therefore, I chose to apply to clerk for you because my mentor, Andy Hahn, recommended you when I told him about my wish to be mentored by an Asian American judge if possible. Furthermore, my long-term goal is to become a federal prosecutor focusing on financial crimes, so I greatly admire your extensive experience as an Assistant United States Attorney.

I will be studying for the bar exam nearby in Ithaca until late July and then will be in my hometown of Nashville throughout all of August. I am of course willing to interview at whatever time is most convenient for you.

I have included my resume, law school transcript, and one writing sample. Letters of recommendation from Professors John Blume, Jaclyn Kelley-Widmer, and Dan Awrey will be submitted by Cornell. Should you require any additional information, please do not hesitate to let me know. Thank you for considering my application.

Sincerely,

Charlene Hong

CHARLENE C. HONG

211 Maple Ave, Apt 212, Ithaca, NY 14850
615-772-6265 | cch245@cornell.edu

Education

CORNELL LAW SCHOOL Ithaca, NY
Juris Doctor, *cum laude,* May 2023
GPA: 3.67 – Myron Taylor Scholar (awarded to top 30% in Class of 2023 after 2L year)
Honors: Winner of 2021 Langfan Family First-Year Moot Court Competition; Kasowitz Prize for Excellence in Legal Writing and Oral Advocacy; 2021 Cuccia Family Moot Court Competition Semi-Finalist; First-Year Lawyering Program Honors Fellow (Teaching Assistant); 11th Ranked Oralist in 2022 Jessup International Law Moot Court Competition U.S. National Rounds; Convocation J.D. Class Speaker
Activities: Cornell Law School Moot Court Board – Chancellor (President); Jessup International Law Moot Court Competition – Cornell Team Captain; Asian Pacific American Law Students Association – Co-President
Journals: *Cornell Law Review* – Articles Editor; Supreme Court Bulletin – Associate

HARVARD COLLEGE Cambridge, MA
Bachelor of Arts in Social Studies, *cum laude,* May 2017
Thesis: "Standing on the Shoulders of Giants: Constructing the Modern South Korean Student's Political Agency"
Honors: 2016-2017 College All-Star Model UN 1st Tier Team; Harvard Korea Institute Summer Research Grant

Experience

Fall 2023 **WACHTELL, LIPTON, ROSEN & KATZ** New York, NY
Incoming Litigation Associate

CORNELL LAW SCHOOL CAPITAL PUNISHMENT CLINIC Ithaca, NY
2023 ***Clinic Member***
- Drafted pleadings and pre-trial briefs for a state post-conviction proceeding on behalf of a death-row inmate

WACHTELL, LIPTON, ROSEN & KATZ New York, NY
2022 ***Summer Associate***
- Rotated through litigation, corporate, and antitrust practice groups

2021 - 2022 **CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC** Ithaca, NY
Clinic Member
- Researched and drafted a brief in support of a TRO on a novel First Amendment claim in federal court

2021 **FEDERAL RESERVE BANK OF NEW YORK** New York, NY
Summer Law Clerk
- Researched and wrote legal memoranda and court documents for litigation matters related to the Bank's account services for foreign central banks

2017-2020 **NOVANTAS, INC.** New York, NY
Financial Services Strategy Consulting Firm
Associate – Lead Associate - Senior Associate
- Managed four concurrent project teams of 2-3 junior associates to produce weekly, tailored reports on industry-wide trends in consumer deposit accounts, interest rate pricing, and banking customer behavior
- Spearheaded campus recruiting initiatives that successfully increased diversity hires and led new hire training for first-year associates
- Researched and presented to clients reports on U.S. consumer banking regulations, BSA/AML compliance, and evolving regulations for fintech and digital banking
- Analyzed data using SQL and statistical software to develop business strategies for sales, distribution, pricing, and resource allocation for U.S. national and super-regional banks
- Spent 3 months in Sydney, Australia, working for an Australian client and using statistical programming to identify the most predictive behavioral and macroeconomic indicators of home mortgage defaults

Personal

- **Volunteering:** Asian American Bar Association of New York – Student Outreach Committee Co-Chair; Circle of Women – Board Member and Alumna Mentor
- **Languages:** Korean (written and spoken), Spanish (written)
- **Interests:** Golf, hiking with my dog, camping, classical piano

Cornell Law School - Grade Report - 06/02/2023

Charlene C Hong

JD, Class of 2023

Course	Title	Instructor(s)	Credits	Grade	
Fall 2020 (8/25/2020 - 11/24/2020)					
LAW 5001.1	Civil Procedure	Clermont	3.0	A-	
LAW 5021.1	Constitutional Law	Rana	4.0	A-	
LAW 5041.3	Contracts	Taylor	4.0	A	
LAW 5081.2	Lawyering	Kelley-Widmer	2.0	A	CALI
LAW 5151.2	Torts	Heise	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.7937
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.7937

^ Dean's List

Spring 2021 (2/2/2021 - 5/7/2021)					
LAW 5001.5	Civil Procedure	Holden-Smith	3.0	A	
LAW 5061.3	Criminal Law	Yellen	3.0	B	
LAW 5081.2	Lawyering	Kelley-Widmer	2.0	A	CALI
LAW 5121.3	Property	Alexander	4.0	A-	
LAW 6681.1	International Law and Foreign Direct Investment	Ndulo	3.0	A	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.7120
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.7541

^ Dean's List

Fall 2021 (8/24/2021 - 12/3/2021)					
LAW 6011.1	Administrative Law	Stiglitz	3.0	B+	
LAW 6461.1	Financial Institutions	Awrey	3.0	A	
LAW 6881.651	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 7125.101	Donald Trump's Constitution	Dorf	3.0	B+	
LAW 7867.301	First Amendment Law Clinic	Carter/Jackson/Murray	4.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	13.0	13.0	3.5892
Cumulative	46.0	46.0	46.0	46.0	44.0	44.0	3.7054

Spring 2022 (1/25/2022 - 5/2/2022)					
LAW 6131.1	Business Organizations	Awrey	4.0	A-	
LAW 6465.1	Global M and A Practice	Kihira	1.0	SX	
LAW 6511.1	Intellectual Property	Liivak	3.0	A-	
LAW 6641.1	Professional Responsibility	Atiq	3.0	A-	
LAW 6881.651	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 7868.301	First Amendment Law Clinic II	Carter/Jackson/Murray	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	13.0	13.0	3.6700
Cumulative	62.0	62.0	62.0	62.0	57.0	57.0	3.6973

Fall 2022 (8/22/2022 - 12/16/2022)					
LAW 6101.1	Antitrust Law	Hay	3.0	B+	
LAW 6821.1	Securities Regulation	Omarova	3.0	A-	
LAW 6921.1	Trial Advocacy	Keir Weyble	5.0	S	

LAW 7675.101	Issues in Financial Regulation	Omarova	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	9.0	9.0	3.5566
Cumulative	76.0	76.0	76.0	76.0	66.0	66.0	3.6781

Spring 2023 (1/23/2023 - 5/16/2023)

LAW 6401.1	Evidence	K. Weyble	4.0	A-
LAW 6431.1	Federal Courts	Gardner	4.0	S
LAW 6569.1	Introduction to Depositions	Fongyee Whelan	2.0	SX
LAW 7811.301	Capital Punishment Clinic 1	Blume/Freedman/Knight	4.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	8.0	8.0	3.6700
Cumulative	90.0	90.0	90.0	90.0	74.0	74.0	3.6772

Total Hours Earned: 90

Received JD cum laude on 05/28/2023

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to highly recommend Charlene Hong for a judicial clerkship. I know Charlene well because she was a student in my full-year Lawyering course during her first year of law school (2020-2021), in which she received the highest grade in the course; and because she served as an Honors Fellow teaching assistant for me for a full academic year during her second year of law school (2021-2022). I witnessed her growth as an exceptional legal writer as a 1L and saw how she applied those skills as a teaching assistant as a 2L. I am confident that she would be a fantastic judicial law clerk in any chambers.

In the rigorous Lawyering course, students submit numerous written assignments, make oral presentations, and meet with me regularly to discuss their work. In my Lawyering class, I was impressed by Charlene's meticulous, precise legal analysis and outstanding writing skills. Her written work easily placed her at the top of her class, as she stood out for her high-quality substantive analysis and ability to effectively write in the legal genre. Further, she is a phenomenal oralist and could confidently discuss her work orally from the very first semester. Charlene is confident and quick-witted at the podium, and her legal brilliance is unsurpassed. Unsurprisingly, she went on to win the first-year moot court competition and receive many other oral-advocacy awards during law school.

Because of her exceptional work in Lawyering and her personable, pleasant nature, I knew Charlene would be a good fit for the Honors Fellow Program. The Program is a competitive, highly selective teaching assistantship in which upper-class law students engage in substantive teaching of 1L students studying legal writing, research, and oral argument skills. Honors Fellows must critique papers, mentor students, participate in teaching, and more.

As an Honors Fellow, Charlene completed numerous critiques of student memos and briefs. She was incredibly attentive to detail, never missing an error, from a misplaced comma to a substantive misstep. In addition to critiquing their work, Charlene displayed an insightful ability to connect with first-year students and mentor them through the writing process. She is adept at considering the way others perceive a problem and explaining complex concepts in an approachable way—skills she advanced during her conferences with first-year students. Many students noted that her mentorship both improved their writing and helped them gain confidence and skills in the long term. Charlene's experience consulting before law school also lent her the maturity and political savvy that it takes to confidently mentor students just a year behind her in law school.

Further, Charlene is skilled at working collaboratively. As one of four Honors Fellows on my team, she was an excellent team member in both working on common tasks and communicating around any challenges that arose. She also helpfully provided me with creative ideas on how to teach different concepts and never hesitated to volunteer for any task. These skills will be invaluable as she works beside other clerks and with judges on legal questions.

Additionally, Charlene is a leader in many arenas. As an Honors Fellow, she confidently led larger class sessions and mentored students in individual meetings. In the broader law-school community, she had leadership roles in moot court, Law Review, and the APALSA student group. She became so well-known (and beloved) in the law-school community that she was selected by her peers to be the student speaker for commencement. Further, her work with the Asian American Bar Association of New York (AABANY) highlights her engagement beyond Cornell as she worked towards supporting Asian American communities through legal projects.

Charlene is a very bright analytical thinker whose intelligence is matched by her professional demeanor and exceptional work product. She would greatly benefit from a clerkship, which she considers a chance to learn the intricacies of litigation and work with a mentor. Having been a mentor to Charlene over the last three years, I can assure you that she is wonderful to work with. I enthusiastically recommend Charlene for a clerkship in your chambers.

Thank you for your time and consideration. Please feel free to contact me at jak533@cornell.edu or 607-255-9898.

Sincerely,

Jaclyn Kelley-Widmer
Clinical Professor of Law
Cornell University Law School

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am the Samuel F. Leibowitz Professor of Trial Techniques at Cornell Law School and the Director of the Cornell Death Penalty Project. Charlene was a student in the Capital Punishment Clinic during the spring 2023 semester. She was also the Chancellor for the Moot Court Board during the 2022-23 Academic Year, and I serve as the faculty advisor to the Board. I also had the opportunity to observe a number of her arguments in Moot Court competitions. Thus, I believe that I have a good vantage point to comment on her qualifications to be a judicial clerk.

Charlene's work in the clinic was excellent in all respects. She was assigned to a team working simultaneously on the briefing of exhausted claims in a federal habeas petition and in developing the merits of an Atkins (intellectual disability) claim in a state court petition in the same client's case. Charlene drafted several different documents including a motion to preclude a second state intellectual disability evaluation, a pre-hearing brief on the issue of current clinical standards for assessing intellectual disability, and at the end of the semester she drafted a motion to preclude a resentencing proceeding in a different case on double jeopardy/collateral estoppel grounds. Charlene demonstrated excellent legal research and writing skills. Her work was very well researched, her writing was cogent and clear, and her work was always completed in a timely fashion. I would put Charlene's legal writing abilities in the top 10% of students I have supervised over the last twenty-five years. This should be no surprise as Charlene has been awarded other honors for her writing including winning the Kasowitz Prize for Legal Writing in her 1L year, receiving the CALI award (overall top performer) both semesters during her 1L year in her Lawyering Class and being selected to be an Honors Fellow for our Lawyering Program. Her excellent skills have been noted, in sum, not only by me but by other faculty and her peers.

Charlene is also extremely personable. She was an excellent team member, very collegial, interacted well with her clients and from my perspective a delight to deal with. She is also very mature, most likely as a result of her three years of experience working for a consulting firm before coming to Cornell Law School. She will definitely get along well her co-clerks and the administrative staff in your chambers.

Charlene had an excellent overall record at Cornell with a very good GPA, and she was simultaneously one of our most involved students. In addition to her involvement with Moot Court, she served as an Articles Editor for our flagship journal and President of the APALSA student affinity group. The respect her peers have for her is reflected in the fact that she was chosen by her fellow students to be the 2023 Student Commencement Speaker (and she did an excellent job by the way).

I talked with Charlene about why she wants to clerk, and she discussed her longer-term career plans of entering public/government service and also the additional skills she would obtain by having a mentor such as yourself during her clerkship. I have no doubt that will be the case.

I sum, I highly recommend that you interview Charlene, and if you do, I have little doubt you will hire her. She is a dynamo. Please do not hesitate to contact me if I can provide you with any additional information. I can be reached at jb94@cornell.edu, or my cell phone is (803) 240-6701.

Very truly yours,

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
and Director of the Cornell Death Penalty Project

Cornell Law School

Dan Awrey
Professor of Law

Cornell Law School
312 Myron Taylor Hall
Ithaca, New York 14853-4901
Phone 607.255.8431 / 607.255.7193 (fax)
E-mail aja288@cornell.edu

June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court
For the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Reference Letter in Support of Charlene Hong

I am writing this reference letter on behalf of Charlene Hong in support of her application for a judicial clerkship. I have no doubt whatsoever that Charlene will be an exceptional clerk.

I first met Charlene as a student in my extremely challenging *Financial Institutions* course in the Fall of 2021. Charlene quickly distinguished herself with her grasp of key financial, business, and regulatory concepts and her ability to ask insightful questions about both the assigned readings and broader questions about the role of financial institutions in society. It was also immediately clear that Charlene was highly motivated, extremely inquisitive, and combines a precise and analytical mind with a kind and energetic disposition. I was not at all surprised when Charlene was amongst the highest performing students in the course, achieving a grade of A. She would also subsequently go on to achieve an A- in my course on *Business Organizations*.

Charlene's performance in *Business Organizations* and *Financial Institutions* was not an aberration. In her first five semesters at Cornell Law School, Charlene received an A- or better in 17 of her 21 graded courses. This is an extremely impressive achievement given Cornell's strict J.D. grading curve. It is even more impressive given Charlene's deep immersion in the extracurricular life of the law school, which has included leadership roles on the *Cornell Law Review*, Moot Court Committee, and Capital Punishment Clinic. There is no doubt that Charlene is determined to make the most of the incredible opportunities that Cornell Law School has to offer.

Following her 2021 summer clerkship at the Federal Reserve Bank of New York (FRBNY), where she worked on ongoing litigation between the FRBNY and foreign central

banks, Charlene sought me out to share her experiences. As a scholar specializing in bank regulation, I was eager to listen and answer her incredibly insightful questions. This also gave me the opportunity to interact with Charlene outside of the classroom, where it became immediately clear that she has all the attributes necessary to be a successful law clerk. First and foremost, Charlene is passionate about the law: both as an intellectual pursuit and as an instrument for achieving social policy objectives. Second, Charlene is a highly effective communicator, gifted with the ability to express her ideas clearly and well, and to engage in the cut and thrust of legal argument and debate. Lastly, Charlene is very composed, has exceptional time management skills, and a sense of professionalism well beyond her years.

I have spoken with Charlene about her reasons for pursing a clerkship and agree with them wholeheartedly. Over the past two years, Charlene and I have spoken frequently about the choice between litigation and transactional practice, and about the rewards and tradeoffs of pursuing a career in private practice versus government service. Having experienced different areas of law as a summer associate, Charlene is currently scheduled to start as a litigation associate at Wachtell, Lipton, Rosen & Katz in New York this coming Fall. Over the longer term, she is interested in pursuing a career in securities litigation and government investigations, either in practice or for an agency like the Securities & Exchange Commission. In light of these goals, a clerkship represents the ideal way for Charlene to gain a better understanding of the litigation process, how judges think, and what it takes to be a truly exceptional litigator.

The experience and skills honed during a clerkship – legal research, writing, working as part of a team – are foundational to the practice of law across jurisdictions and fields. A clerkship will also offer Charlene an unparalleled opportunity to quench her deep and genuine interest in the law, and to deepen her knowledge in specific substantive and procedural areas. As with her time at Cornell, I am entirely confident that Charlene will make the most of these opportunities. For these reasons, I recommend her to you without reservation.

Thank you for your time and attention in reviewing Charlene's application. Please do not hesitate to contact me should you have any questions or require further information.

Very warm regards,

Dan Awrey
Professor of Law
Cornell Law School

CHARLENE C. HONG

WRITING SAMPLE

The following writing sample is a draft pleading written on behalf of my client, a death row inmate in South Carolina, for the Capital Punishment Clinic at Cornell Law School during the spring of my third year. I obtained permission from the clinic's faculty to use this draft as a sample.

As part of the litigation related to my client's second post-conviction relief application, my task was to research and write a pleading objecting to the State's likely motion to request a second mental evaluation of my client, after the court had already granted its previous motion for the first evaluation. The pleading will be submitted if the State proceeds to file a motion for the second evaluation.

The pleading received minor edits from the supervising faculty, but it is otherwise substantially my writing. All identifying names and information have been changed or redacted. The citation style adheres to South Carolina state court rules.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTEETH JUDICIAL
COUNTY OF MYRON	)	CIRCUIT
	)	
John Smith,	)	Case No. [redacted]
Applicant,	)	
	)	
vs.	)	**Applicant's Objections to State's Proposed Order for a Second Evaluation**
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

The Applicant, John Smith, objects to the State's motion requesting that it be allowed a second "bite at the apple" regarding the issue of whether Mr. Smith is a person with intellectual disability. This Court should refuse to allow the State to shop for a more favorable opinion by permitting an additional assessment by a new examiner.

INTRODUCTION

On May 30, 2019, the State, by written motion, requested that this Court order that Mr. Smith be required to submit to an evaluation by the South Carolina Department of Disabilities and Special Needs ("DDSN") to determine whether he is a person with intellectual disability. The Court granted the motion and ordered an *Atkins*[1] Evaluation on July 1, 2019. Order for *Atkins* Evaluation by Department of Disabilities and Special Needs (Jul. 1, 2019). The Court mandated that the evaluation be completed by "a qualified examiner or examiners designated by [the South Carolina Department of Disabilities and Special Needs] who are experienced and trained clinicians, and at least one of whom has expertise in the field of intellectual disability." *Id.* Pursuant to the order, the examiner was to use appropriate testing and review of documents, materials, and witnesses to determine whether Mr. Smith has intellectual disability under the

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

definition provided in S.C. Code Ann. § 16-3-20. *Id.* The Court's Order also noted that either party may retain their own mental health experts regarding the intellectual disability claim. *Id.*

Despite having already received a court-ordered DDSN *Atkins* evaluation, the State now wishes to conduct another, duplicative *Atkins* evaluation of Mr. Smith for the sole purpose of expert shopping. This Court should deny the State's request for an additional evaluation.

BACKGROUND

On behalf of the South Carolina Department of Disabilities and Special Needs ("DDSN"), Dr. Jane Brown conducted a clinical interview of Mr. Smith on March 23, 2021. Mr. Smith's interview lasted approximately two hours and thirty minutes. After analyzing the interview with Mr. Smith, conducting her own interviews with multiple witnesses, and reviewing available records,[2] Dr. Brown concluded that Mr. Smith meets all three prongs for the diagnosis of Intellectual Disability. Mr. Smith experiences deficits in intellectual and adaptive functioning, and these deficits were onset in Mr. Smith's developmental period, as evidenced by his school records.

Mr. Smith also retained a licensed clinical psychologist, Dr. Sarah Freed,[3] to conduct an *Atkins* evaluation. Dr. Freed interviewed Mr. Smith on November 9, 2017, and administered the *Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV)* at the time of the interview. Dr. Freed also conducted several collateral interviews with peers and friends of Mr. Smith and reviewed supplemental records. Based on the WAIS-IV test, Dr. Freed found Mr. Smith to have an IQ roughly two standard deviations below the mean; she therefore found him to have significantly subaverage intellectual functioning. According to Dr. Freed's report, Mr. Smith "had deficits [in intellectual functioning] that emerged during the required developmental period, has

[2] The records comprise both childhood IQ scores and recent IQ testing, including the underlying raw data, conducted by Dr. Sarah Freed on November 9, 2017.
[3] Dr. Sarah Freed's report is attached as Exhibit A for this Court's review.

scored about two standard deviations below the mean on formal IQ testing, and has demonstrated adaptive functioning impairments evident and documented since childhood." Exhibit A at 13. Thus, Dr. Freed agreed with Dr. Brown's conclusion that Mr. Smith met the formal diagnostic criteria for intellectual disability according to South Carolina law, the DSM-5, and the American Association on Intellectual and Developmental Disabilities criteria.

ARGUMENT

The Eighth Amendment of the United States Constitution prohibits the execution of a person with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Franklin v. Maynard*, the South Carolina Supreme Court established this state's *Atkins* procedures. 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003). Under *Franklin*, the trial judge will determine whether the defendant has intellectual disability in a pre-trial hearing after considering evidence, including expert testimony, from both parties. *Id.* at 279, 588 S.E.2d at 606. The defendant must prove that he or she is a person with intellectual disability by a preponderance of the evidence. *Id.* Moreover, a capital defendant must have the "fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014).

I. Opinion shopping is not a compelling reason to grant the State a second evaluation without any other justification.

There is no precedent in South Carolina for courts granting the State a second evaluation in an *Atkins* case. At least eleven *Atkins* determinations have been conducted in South Carolina,[4] and the State has never been granted an additional opportunity to have a different examiner conduct an evaluation after the DDSN assessment. Notably, in the *Atkins* determinations of Bennie Brown and Edward Elmore, the DDSN examiners found that Brown and Elmore were persons with

[4] *Atkins* determinations were conducted for the following individuals in South Carolina: Fredrick Evans, Johnny Ringo Pearson, Edward Elmore, Ricky George, Kenneth Simmons, Ellis Franklin, Ricky Blackwell, William Bell, Bennie Brown, Kevin Mercer, and Bayan Aleksey.

intellectual disability, and the State did not receive another evaluation.

Beyond the lack of on-point precedent, a series of cases decided by the South Carolina Supreme Court also makes clear that, while a trial judge has the discretion to order an additional mental evaluation to assess a defendant's criminal responsibility, *Monahan v. State*, 365 S.C. 130, 132–34, 616 S.E.2d 422, 423–24 (2005), it should do so only under narrow circumstances, where some new issue not apparent at the time of the original evaluation has arisen. A trial judge's refusal to grant an evaluation will not be overturned on appeal without a clear showing of an abuse of discretion. *State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916–17 (Ct. App. 2007).

In *Monahan*, the South Carolina Supreme Court found no abuse of discretion where the trial court ordered that the defendant undergo a second evaluation at the State's request *after* the defendant indicated his intent to introduce at trial evidence of his lack of criminal responsibility. 365 S.C. at 133-34, 616 S.E.2d at 424. The Court noted that the State requested another examination—besides the initial evaluation for competency to stand trial—after it was made aware that the defendant would submit an insanity defense, and that there was "no evidence the State was engaging in 'opinion shopping' by requesting another expert evaluation." *Id.*

Similarly, the South Carolina Supreme Court found in *State v. Bixby*, that a court did not abuse its discretion in ordering a criminal defendant to submit to a mental evaluation where the defendant intended to introduce mitigating evidence regarding his mental health during the sentencing phase of his capital trial. 388 S.C. 528, 558, 698 S.E.2d 572, 588 (2010). The court relied on its previous reasoning in *State v. Locklair*, where it granted the State's request for an independent examination because the defendant had announced his intent to introduce evidence regarding his mental health during the sentencing phase and had therefore "opened the door to the issue." 341 S.C. 352, 365, 535 S.E.2d 420, 427 (2000). Because the *Bixby* defendant had

previously only been evaluated by the State for competency, the State had not yet had an opportunity to assess the presence or absence of mental health-related mitigation, and thus the defense's mitigation evidence made his mental state (beyond competency) a new issue at trial. 388 S.C. at 588, 698 S.E.2d. at 558.

However, Mr. Smith's case is distinguishable from all the aforementioned cases because the State made its initial request for an examination in May of 2019, after Mr. Smith had already submitted his second PCR action on June 5, 2018, and alleged that he was a person with intellectual disability. Order Granting Motion to Dismiss in Part and Denying in Part (Feb. 20, 2019). The request was granted with all parties' full awareness of the nature and scope of the DDSN evaluation.

In *McWilliams v. Dunn*, the Supreme Court of the United States noted that a state-employed neuropsychologist's evaluation of the defendant satisfied the examination prong of the *Ake* requirements[5] and fulfilled the trial court's order that the State of Alabama "complete neurological and neuropsychological testing on the Defendant in order to have the test results available for his sentencing hearing." 137 S.Ct. 1790, 1795–96, 1800–01 (2017). Similarly here, the evaluation conducted by DDSN-employed Dr. Brown fulfills the examination required by the Court's Order granting the State's request. The State has received the examination by a state-employed examiner that it requested but now seeks another opinion merely because it is dissatisfied by the DDSN examiner's conclusion that Mr. Smith is a person with intellectual disability.

The State has also not submitted any reasons as to why Dr. Brown is not an adequate state examiner. Dr. Brown's competence to conduct an assessment for intellectual disability is

[5] *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (requiring that the State provide access to a competent psychiatrist, who will "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," for a defendant who demonstrates that his sanity will be a significant issue at trial).

undoubted as she is a licensed clinical psychologist and the Chief Examiner of the Office of Clinical Services for South Carolina's DDSN. She therefore meets the Court's specific orders for the *Atkins* evaluation to be conducted by a fully qualified expert designated by DDSN. Furthermore, she has evaluated several other capital inmates in the *Atkins* context, frequently testifying as the State's expert.[6]

Here, the State makes no effort to hide its obvious motivation to shop for an expert opinion that concludes in its favor. The State has not provided any reasons as to why the two evaluations, including the court-ordered one conducted by Dr. Brown, are inadequate to confirm (or reject) Mr. Smith's claim that he is a person with intellectual disability. There is also no indication that a third evaluation would likely result in a clinical conclusion in the State's favor. Both Dr. Brown and Dr. Freed determined that Mr. Smith is a person with intellectual disability, and it is likely that a third evaluation would reach the same conclusion. Regardless, there is no justification to let the State expert shop and waste time and resources to comb for an opinion in its favor that a second attempt will likely not produce.

II. A second evaluation would be cumulative to the evaluations already submitted and therefore not assist the Court in the evidentiary hearing.

Other states' courts have found requests for second mental evaluations to be redundant and unnecessary. *See Anderson v. State*, 18 So. 3d 501, 511–12 (Fla. 2009) ("The fact that [the defendant] has subsequently found experts whose opinions conflict with [the mental health expert's] opinion does not render the earlier evaluation inadequate."); *Sexton v. State*, 997 So. 2d 1073, 1085 (Fla. 2008) (noting that the subsequent finding of an expert who disagrees with "the extent or type of testing performed, or the type of mitigation presented, does not mean that trial

[6] Dr. Brown has conducted *Atkins* evaluations of the following individuals: Bayan Aleksey, Bennie Ray Brown, William Ryan Looper, and John Smith. She reviewed records and testified for the State in William Bell's case. She determined that Aleksey, Bell, and Looper were not persons with intellectual disability.

counsel was deficient at trial").

The Arizona Court of Appeals was not persuaded that the passage of a mere two months would lead to a more accurate second mental evaluation of the defendant. *In re Wilputte S.*, 100 P.3d 929, 932 (Ariz. Ct. App. 2004). Moreover, the State had made no attempts to allege that the expert who performed the first evaluation was unqualified, had used improper methodology, or made any errors or omissions during the testing process. *Id.* The State also had not contended any material changes in circumstances or conditions since the performance of the first evaluation that justified the need for a second evaluation. *Id.* Thus, without full justification, the Arizona court ruled that the trial court did not abuse its discretion in dismissing the request for a second evaluation. *Id.*

Additionally, state courts in New York and Mississippi have found that, where an adequate examination was already conducted, it is an abuse of discretion to compel a party to submit to further examinations at the request of the opposing party that does not offer any reasons for the request. *See Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 294–95 (N.Y. App. Div. 1985) ("To order plaintiff to submit to a highly personal and subjective interview conducted by [the defendant's expert] would, in effect, amount to bolstering the preconceived opinions of defendant's retained expert."); *State v. Russell*, 238 So. 3d 1105, 1114–15 (Miss. 2017) (Waller, C.J., dissenting) (". . . we must find that the State had shown good cause justifying additional psychological testing of [the capital defendant] in order to conclude that the trial court abused its discretion in denying the State's motion.") (disagreeing with the majority's determination that the State had provided sufficient explanation through its expert as to why prior testing did not constitute a complete *Atkins* evaluation).

As demonstrated by these cases, trial courts may only exercise their discretion to order

second evaluations in a limited set of situations. Those situations are restricted to where there are material changes in circumstances or conditions since the performance of the first evaluation to warrant a second evaluation, where some defect in the testing methodology or the qualifications of the expert who conducted the evaluation is brought to light, or the evaluation was for a different purpose (e.g., an evaluation for a capacity to stand trial differs from an evaluation for criminal responsibility).

None of these situations apply here. There have been no material changes in Mr. Smith's circumstances or condition since the performance of the first evaluation, which the State fully knew was conducted to determine whether Mr. Smith was a person with intellectual disability. No changes in the clinical consensus of intellectual disability have been announced, and there has been no modification to the legal standards for assessing intellectual disability. Further, the State has not provided any legitimate justification as to why the examination conducted by Dr. Brown is inadequate or inaccurate. In sum, the State has not made any convincing arguments as to why the second evaluation is necessary; thus, one may conclude that the State has all the evidence it needs to confirm or rebut Mr. Smith's claim of intellectual disability. The State cannot take another bite of the apple through requesting a redundant evaluation that would only be cumulative to the evaluations by Dr. Brown and Dr. Freed already submitted.

CONCLUSION

This Court should deny the State's request for a second evaluation of Mr. Smith.

Respectfully submitted,

[Signing Attorney's Name]

s/_____

Counsel for Applicant.

Applicant Details

First Name	**Nicandro**
Last Name	**Iannacci**
Citizenship Status	**U. S. Citizen**
Email Address	**ngi2103@columbia.edu**
Address	**Address** **Street** **1205 Queen Anne Ave N, Apt 205** **City** **Seattle** **State/Territory** **Washington** **Zip** **98109** **Country** **United States**
Contact Phone Number	**513-502-2360**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2013**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court** **Williams Institute Moot Court**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Metzger, Gillian
gmetzg1@law.columbia.edu
Funk, Kellen
krf2138@columbia.edu
5056093854

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicandro Iannacci
1205 Queen Anne Ave N, Apt 205
Seattle, WA 98109
(513) 502-2360
ngi2103@columbia.edu

April 26, 2023

The Honorable Kiyo Matsumoto
United States District Court
for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a 2020 graduate of Columbia Law School, where I was a James Kent Scholar and Harlan Fiske Stone Scholar and an editor of the *Columbia Human Rights Law Review*. I am currently a judicial law clerk for the Honorable Tana Lin in the Western District of Washington. Prior to my clerkship, I was a staff attorney at Queens Defenders, a public defense organization in New York. I now write to apply for a clerkship in your chambers beginning in October 2025. I am also excited to return to New York City, where I met my partner and intend to make my permanent home.

For several years, I have worked in the public interest, and I am committed to continuing that work. My commitment originates from a fundamental sense of fairness and a belief in universal human dignity that I have nurtured since childhood. In particular, as a gay man, I have learned how law can both liberate and constrain marginalized groups. After law school, I worked as a public defender in Queens, and I hope to pursue further work as both a trial lawyer and an appellate advocate. During law school, I built a foundation for this career by working as a research assistant and as an intern in offices dedicated to criminal law and immigration law. I look forward to contributing to your chambers during my clerkship, which would be crucial preparation for a further career in the public interest.

Enclosed please find a resume, a writing sample, and a law school transcript. Please also find enclosed two letters of recommendation from Professors Gillian Metzger (212-854-2667, gmetzg1@law.columbia.edu) and Kellen Funk (505-609-3854, krf2138@columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Sincerely,

Nicandro Iannacci

NICANDRO G. L. IANNACCI

1205 Queen Anne Ave N, Apt 205 · Seattle, WA 98109 · (513) 502-2360 · ngi2103@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL New York, New York
Juris Doctor *Received May 2020*

Honors: James Kent Scholar, 2019-2020 (outstanding academic achievement); Harlan Fiske Stone Scholar, 2018-2019 (superior academic achievement); Best in Class Award (Family Law, Spring 2019)

Activities: Research Assistant (Profs. Kellen Funk, Cynthia Godsoe, Karen Tani); *Columbia Human Rights Law Review* (State Supplement Editor, *A Jailhouse Lawyer's Manual*); American Constitution Society (Co-President); Public Defender Students (Bail Reform Chair); OutLaws LGBTQ Association (Secretary); Williams Institute Moot Court (Coach) (gender identity & sexual orientation law)

HARVARD UNIVERSITY Cambridge, Massachusetts
Bachelor of Arts in Government *Received May 2013*

EXPERIENCE

HON. TANA LIN, DISTRICT JUDGE, U.S. DISTRICT COURT, W.D. WASH. Seattle, Washington
Judicial Law Clerk April 2023-present

QUEENS DEFENDERS Queens, New York
Staff Attorney September 2020-March 2023
Responsible for a combined felony and misdemeanor caseload, including investigation and negotiation. Conducted legal research and file motions on speedy trial and discovery. Represented clients at trials, hearings and arraignments.

THE LEGAL AID SOCIETY New York, New York
Legal Extern, Immigration Law Unit September-December 2019
Conducted legal research and drafted motions and memoranda on immigration consequences of criminal records. Held client meetings and interviews. Observed immigration court.

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE Seattle, Washington
Rule 9 Legal Intern, Northwest Defenders Division June-August 2019
Served as co-counsel on four jury trials. Wrote and argued writ of habeas corpus and motions to suppress and dismiss. Conducted all parts of trial practice, including voir dire, cross-examination, and closing statement.

NEIGHBORHOOD DEFENDER SERVICE OF HARLEM New York, New York
Legal Extern, Criminal Defense Practice September 2018-May 2019
Managed all aspects of three misdemeanor cases. Drafted motions and conducted legal research. Participated in arraignments. Supported attorneys, including investigation, mitigation, and trial preparation.

ORLEANS PUBLIC DEFENDERS New Orleans, Louisiana
Law Clerk May 2018-August 2018
Conducted legal research and drafted motions and memoranda on issues including bond, suppression, immunity agreements, and jury selection. Held client meetings and interviews. Conducted investigations and analyzed discovery.

NATIONAL CONSTITUTION CENTER Philadelphia, Pennsylvania
Web Content Strategist May 2014-July 2017
Wrote for *Constitution Daily*, the Center's blog, and edited contributions from scholars and advocates. Produced *We the People*, a weekly podcast series on constitutional issues. Assisted in program planning and administration.

AMERICAN CONSTITUTION SOCIETY Washington, DC
Communications Fellow August 2013-May 2014
Wrote for *ACSblog* and edited contributions from scholars and advocates. Drafted press releases and tracked press activity. Coordinated publication of weekly national bulletin and maintained national website.

Interests: reading, being a dog father, watching Cincinnati Reds baseball, singing choral music.

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CLS TRANSCRIPT (Unofficial)

03/28/2021 12:56:14

Program: Juris Doctor

Nicandro Gary Louis Iannacci

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C. A.	4.0	CR
L6274-2	Professional Responsibility	Rose, Kathy	2.0	CR
L9515-1	Reading Group in Law and Capitalism	Pistor, Katharina	1.0	CR
L8660-1	S. Appellate Advocacy	Livingston, Debra A.; Lynch, Gerard E.	3.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6604-1	Ex. Immigration Defense	Buckel, Katherine; Unger, Mia	2.0	A-
L6604-2	Ex. Immigration Defense - Fieldwork	Buckel, Katherine; Unger, Mia	3.0	CR
L6425-1	Federal Courts	Metzger, Gillian	4.0	A
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L9175-2	S. Trial Practice	Jones, Patrick	2.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Kessler, Jeremy	3.0	A-
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6656-1	Ex. Neighborhood Defender Service of Harlem Community Defense	Knecht, Matthew; Steed, Seth	2.0	CR
L6656-2	Ex. Neighborhood Defender Service of Harlem Community Defense - Fieldwork	Knecht, Matthew; Steed, Seth	2.0	CR
L6252-1	Family Law	Godsoe, Cynthia	3.0	A+
L6655-1	Human Rights Law Review		0.0	CR
L6867-1	Independent Moot Court Coaching	Strauss, Ilene	1.0	CR
L8281-1	S. Crime and Punishment in American History	Seo, Sarah A.	2.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6241-1	Evidence	Shechtman, Paul	3.0	A-
L6656-1	Ex. Neighborhood Defender Service of Harlem Community Defense	Knecht, Matthew; Steed, Seth	2.0	CR
L6656-2	Ex. Neighborhood Defender Service of Harlem Community Defense - Fieldwork	Knecht, Matthew; Steed, Seth	2.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6250-1	Immigration Law	Hyde, Alan	3.0	B+
L6675-1	Major Writing Credit	Shanahan, Colleen F.	0.0	CR
L8868-1	S. The American Bail System [Minor Writing Credit - Earned]	Funk, Kellen Richard	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	B+
L6108-1	Criminal Law	Wu, Timothy	3.0	B
L6473-1	Labor Law	Barenberg, Mark	4.0	B+
L6121-31	Legal Practice Workshop II	Sherwin, Galen L.	1.0	P
L6116-3	Property	Heller, Michael A.	4.0	B+
L6874-1	Williams Institute Moot Court	Sherwin, Galen L.; Strauss, Ilene	0.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2017

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B+
L6113-4	Legal Methods	Sovern, Michael I.	3.0	CR
L6115-10	Legal Practice Workshop I	Epstein, Eric; Newman, Mariana	2.0	HP
L6118-2	Torts	Underhill, Kristen	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Total Registered JD Program Points: 92.0

Total Earned JD Program Points: 92.0

Best In Class Awards

Semester	Course ID	Course Name
Spring 2019	L6252-1	Family Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2019-20	James Kent Scholar	3L
2018-19	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	63.0

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I'm writing to recommend Nicandro Iannacci, a recent Columbia Law School graduate, for a clerkship in your chambers. Nicandro is a very thoughtful and intelligent young lawyer whose substantial legal abilities have really blossomed over his time at Columbia. He also stands out for his commitment to public interest law and criminal justice. I believe he has the makings of an excellent law clerk and recommend him enthusiastically.

I first got to know Nicandro before he showed up at Columbia, when I came down to the National Constitution Center where he was working for several years. I was impressed by him even then, and delighted that he ended up choosing Columbia for law school. I did not teach him until his 3L year, but got to work with him in my capacity as faculty advisor to ACS when he was the Columbia ACS Chapter co-president. ACS had a successful year under his leadership, and he helped ensure it had an active presence in the life of the law school. Nicandro's deep public interest commitments are evident from his resume. In addition to spending several years at the NCC and working at ACS for a year before that, he has devoted substantial time while at law school working on criminal justice issues, externing and interning at numerous public defender offices.

I was very pleased to finally get Nicandro as a student in Federal Courts in the fall of his 3L year. He did extremely well, earning a straight A in a very strong class. Both his on-call performance and exam demonstrated a very sophisticated grasp of the material and strong analytic skill. I particularly appreciated his volunteered comments, which were uniformly excellent and really enhanced class discussion. Looking at Nicandro's transcript, there is a notable difference from his 1L year, where he struggled more, and his impressive performance in his 2L and 3L years — including this last year attaining CLS's highest academic honor of Kent Scholar. I've found a similar pattern with other very strong students who have taken several years off and simply need a semester of two to adjust to being back in school. From my own experience with Nicandro in Federal Courts, and his 2L and 3L grades, I have no doubts about Nicandro's substantial analytic ability and legal skills.

Finally, over the years I've had several opportunities to meet with Nicandro and interact with him in different environments. I've always been impressed by his maturity and engaging manner. I am confident that you would find him a welcome presence in your chambers.

Please do not hesitate to be in touch if there is any additional information on Nicandro that I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Nicandro Iannacci (Columbia ’20) for a clerkship in your chambers during the ear- liest available term. Mr. Iannacci was an exceptional student in my American Bail seminar and a keen and skillful research assistant on the history of the American bail system. Since graduating from Columbia, he has become a successful and forceful advocate in public defense. I am sure he will make an excellent clerk.

In seminar, Mr. Iannacci was my “crutch” student—the one I could always rely on to have thoroughly prepared the materials and who would always be ready to provide a thoughtful answer and extend the conversation if the rest of the class was confused or underprepared. While Mr. Iannacci was clearly drawn to the abolitionist pole of our policy debates in class, he did not skimp on engaging legal doctrine with a thorough, detailed appreciation for the possibilities and tensions. His final paper for the class was an ex- emplary fine-grained analysis on the incorporation of the Excessive Bail Clause against the states that in many ways anticipated the Supreme Court’s *Timbs v. Indiana* decision rendered the following term.

Mr. Iannacci also performed admirably as a research assistant for me during the spring 2020 semester. His services were so valuable it was worth jumping through the hoops to make him a “permanent” employee of the University so that his work on our projects could continue over the summer after his graduation while he was simultaneously preparing for the bar examination. His assignments included archival re- search that was well outside the wheelhouse of a typical law student, but he leapt at the opportunity to learn new skills, and he submitted well-written research memos and mastered unfamiliar technologies with remarkable speed. In our final project working together, Mr. Iannacci surveyed the digital records of hundreds of county assessor’s office to develop a method that would allow us to trace the pandemic’s ef- fect on bail bond liens and foreclosures across urban landscapes—path-breaking work requiring real so- phistication with local legal practices that should yield insights for years of research to come.

As a junior professor, I understand that superlatives like “top tier student” do not count for much yet. What I can say is that I was recently in the business of hiring clerks myself—in the chambers of Judge Lee H. Rosenthal of the Southern District of Texas and Judge Stephen F. Williams of the D.C. Circuit. Both judges had formidable, exacting standards for writing that was concise, efficient, and clear, and for clerks that were responsible, thoughtful, and engaging. By those standards, I would have leapt at the chance to hire Mr. Iannacci, and I hope you will strongly consider his candidacy.

I am available by e-mail at krf2138@columbia.edu if you would like to discuss Mr. Iannacci’s application further.

Respectfully yours,

Kellen Funk

Kellen Funk - krf2138@columbia.edu - 5056093854

Iannacci, Nicandro

Writing Sample

The following writing sample is excerpted from a motion to dismiss that I wrote and filed in New York City criminal court. I am the sole author and editor of this motion.

The motion makes two arguments: first, that deficiencies in the charging instrument required dismissal; and second, that deficiencies in the prosecution's compliance with discovery requirements required dismissal. The motion was granted on both grounds.

I have redacted my client's name to protect their privacy.

MOTION TO DISMISS

I. THE ACCUSATORY INSTRUMENT IS FACIALLY INSUFFICIENT BECAUSE THE ELEMENTS OF THE CHARGE OF DRIVING TOO SLOW ARE NOT ESTABLISHED.

A misdemeanor complaint must be facially sufficient before it can be converted to an information upon which the prosecution can proceed to trial. C.P.L. § 170.65(1); People v. Dumas, 68 N.Y.2d 729 (1986). A facially sufficient accusatory instrument is a non-waivable, jurisdictional prerequisite to a valid prosecution. People v. Dreyden, 15 N.Y.3d 100 (2010); People v. Alejandro, 70 N.Y.2d 133, 135-36 (1987). To be facially sufficient, an information must (1) provide reasonable cause to believe that the defendant committed the offenses charged in the information, and (2) include non-hearsay factual allegations, which, if true, establish *every element* of the offenses charged. C.P.L. §§ 100.40(1)(b)-(c) (emphasis added). Because facial insufficiency is a jurisdictional defect, the remedy is dismissal of the accusatory instrument. See C.P.L. §§ 30.30(5-a), 100.15(3), 100.40(1)(c), 170.30(1)(a); Alejandro, 70 N.Y.2d at 134-35.

Importantly, under the recent amendments to C.P.L. § 30.30, partial conversion is no longer permitted: the prosecution must convert *all counts* of an accusatory instrument to be ready for trial. C.P.L. § 30.30(5-a); see William C. Donnino, Supplemental Practice Commentary, C.P.L. § 30.30 ("Subdivision [5-a] was designed to abrogate decisional law that authorized the prosecution to answer 'ready for trial' on an accusatory instrument … that had been converted to an information as to some but not all of the charges"), People v. Mendoza, CR-010736-21QN, slip op. at 3 (Crim. Ct. Queens Co. 2022) (Gershuny, J.) (attached) (invaliding statement of readiness where prosecution conceded partial facial insufficiency), People v. Scott, 73 Misc.3d 393, 396 (Crim. Ct. N.Y. Co. 2021) ("The recent amendments provide that the People may not validly announce their readiness for trial if any unconverted counts remain in the accusatory instrument"), People v.

Herrera, 73 Misc.3d 334, 334 (Crim. Ct. Bronx Co. 2021) (noting that the practice of partial conversion "ended with the new legislation"), People v. Young, 2021 N.Y. Slip Op. 50604(U), *3 (Crim. Ct. N.Y. Co. 2021) ("[T]he enactment of CPL 30.30 [5-a] was a response to critics of the practice of partial conversion and to provide a bright-line rule as to when the People can answer ready for purposes of speedy trial").

Here, [REDACTED] is charged with one count of Driving Too Slow, V.T.L. § 1181(a). The statute states:

> No person shall drive a motor vehicle at such a slow speed **as to impede the normal and reasonable movement of traffic** except when reduced speed is necessary for safe operation or in compliance with law.

Id. (emphasis added). The oldest reported case interpreting this statute appears to be People v. Beeney, 181 Misc.2d 201 (Co. Ct. Monroe Co. 1999). In a thorough decision, the court looked to the text of the statute, as well as to similar statutes and decisions from other states, to hold:

> **[T]he dispositive factor when determining whether slow speed is a violation** … **is its effect upon other drivers**. In other words, whether the slowness impedes traffic so as to pose a real danger to other motorists, as opposed to potential danger or temporary inconvenience.

Id. at 206 (emphasis added). The court later explained:

> Were law enforcement officers to charge every driver who caused another motorist to wait a moment or two to pass him (i.e. to impede his progress), they would do little else but write traffic tickets. As any motorist knows, sometimes there are drivers, for any number of reasons, who choose not to travel at the maximum speed limit. **So long as such a driver does not impede the normal and reasonable flow of traffic so as to create a clear, present and real danger, he is not violating the law.**

Id. at 207 (emphasis added). In that case, the defendant was driving about 25 miles per hour (mph) under the posted speed limit on a multi-lane highway with other vehicles behind him. Id. There was no evidence presented that the other drivers were not free to pass the defendant or were otherwise put in danger. Id. The court reversed and vacated the conviction because "the record

shows, at best, that the defendant's slower speed briefly delayed faster drivers but did not endanger them." Id. at 208.

Other courts have interpreted V.T.L. § 1181(a) in harmony with the Beeney Court, finding that the adduced facts did not establish a violation of the statute. For example, in People v. Martinez, 31 Misc.3d 201 (District Ct. Nassau Co. 2011), the court concluded that there are three elements to the statute: (1) operation of a motor vehicle below the speed limit, (2) which impedes normal and reasonable movement of traffic, and (3) creates a clear, present, and real danger. Id. at 205. In that case, a car sat at a traffic light for almost an entire cycle, forcing cars to go around him before making a turn. Id. at 203. The court held that there was no probable cause to stop the defendant for a violation of V.T.L. § 1181(a) because there was no interference with the reasonable progress of other drivers and because there was no danger of any kind to other drivers. Id. at 206.

See also, e.g., People v. Stead, 2008 N.Y. Slip Op. 50032(U), *2 (Co. Ct. Broome Co. 2008) (error to leave grand jury with impression that defendant violated statute where they were driving 10 mph under the speed limit at night, on the right-hand side, with no traffic on the road), citing Beeney, 181 Misc.2d 201; Paolino v. Swarts, 105 A.D.3d 850, 852 (App. Div. 2d Dept. 2013) (no substantial evidence that defendant violated statute where there was no evidence that reduction of speed was unnecessary for safe operation or done for any other purpose); State v. Hannah, 259 S.W.3d 716, 722 (Tenn. 2008) (holding that a driver "impedes traffic when his or her reduced speed interrupts the 'normal and reasonable movement of traffic' by blocking or backing up traffic"), citing Beeney, 181 Misc.2d at 206.

Here, the factual allegations do not establish every element of V.T.L. § 1181(a). Specifically, there are *no* facts to establish that [REDACTED] "impede[d] the normal and reasonable movement of traffic," or that he created a danger to other drivers. Indeed, there is no

allegation that *any other drivers* were present on the road at the time of the alleged incident. There are also no allegations about road conditions to show that the driving was not done for the purpose of safe operation or compliance with law. The only allegations are that a vehicle was "rolling and barely moving" in a 25 mph area, and that "the sound of a revving engine from said vehicle" was heard. But courts have understood that mere operation under the speed limit is *not enough* to establish a violation of the statute.[1] Without additional factual allegations that any other drivers were present, that their "normal and reasonable movement" was impeded, and that the vehicle's movement created a danger to them, elements of this offense have been completely omitted.

For all these reasons, the count of Driving Too Slow is facially insufficient. Because partial conversion is not permitted, the accusatory instrument cannot be converted to an information and must be dismissed. C.P.L. §§ 30.30(5-a), 100.40.

II. THE CERTIFICATE OF COMPLIANCE IS IMPROPER BECAUSE THE PROSECUTION HAS NOT DEMONSTRATED DUE DILIGENCE AND REASONABLENESS IN FILING THE CERTIFICATE.

Under C.P.L. Art. 245, the prosecution is not ready for trial unless they have filed a proper certificate of compliance that they have fulfilled their automatic discovery obligations. If discovery is missing, the certificate may still be valid only if the prosecution demonstrates that they exercised due diligence and reasonableness prior to filing the certificate, or requests certain extensions or exemptions. Here, discovery was missing when the certificate of compliance was filed on January 7, 2022, and the prosecution has not demonstrated due diligence that would excuse its absence or delay. Therefore, they were not actually ready for trial.

A. The Prosecution's Trial Readiness Is Conditioned on the Filing of a Proper Certificate of Compliance.

[1] Indeed, slow speed is considered by some to be prudent or desirable. See Brian Bant, "New law that could reduce NYC speed limits to 20 mph, 5 mph passes state Senate committee," 1010 WINS (Feb. 1, 2022, 2:40pm), https://www.audacy.com/1010wins/news/local/new-law-reduce-nyc-speed-limits-pass-state-senate-committee.

Under C.P.L. Art. 245, the prosecution is not ready for trial unless they have filed a proper certificate of compliance that they have fulfilled their automatic discovery obligations articulated in C.P.L. § 245.20(1):

> Notwithstanding the provisions of any other law, **absent an individualized finding of special circumstances** in the instant case by the court before which the charge is pending, **the prosecution shall not be deemed ready for trial** for purposes of [C.P.L. § 30.30] **until it has filed a proper certificate** pursuant to [C.P.L. § 245.20(1)].

C.P.L. § 245.50(3) (emphases added). Automatically discoverable materials include "all items and information" that "relate to the subject matter of the case" and are "in the possession, custody or control of the prosecution." C.P.L. § 245.20(1); see also C.P.L. § 245.20(7) ("There shall be a presumption in favor of disclosure when interpreting … [C.P.L. 245.20(1)]"). All discoverable materials in the possession of the NYPD, or any other state and local law enforcement, "shall be deemed in the possession of the prosecution." C.P.L. § 245.20(2). The prosecution "shall endeavor" to ensure a "flow of information is maintained" with police and other investigators, "sufficient to place within his or her possession or control all material and information" related to the case. C.P.L. § 245.55(1). Automatically discoverable materials also include items and information that are *not* in the prosecution's possession, custody, or control, so long as the defendant may not obtain it themself by subpoena. C.P.L. § 245.20(2).

Further, a proper certificate of compliance is one that is filed after the prosecution has exercised due diligence and reasonableness in ascertaining and making available all discoverable items and information:

> The certificate of compliance **shall state that**, **after exercising due diligence and making reasonable inquiries to ascertain the existence** of material and information subject to discovery, the prosecutor has **disclosed and made available all known material and information** subject to discovery.

C.P.L. § 245.50(1) (emphases added). This "due diligence standard" is echoed in C.P.L. § 245.20(2) and extends to materials outside the prosecution's possession, custody, or control:

> The prosecutor shall make **a diligent, good faith effort to ascertain the existence of material or information discoverable** under [C.P.L. § 245.20(1)] **and to cause such material or information to be made available** for discovery where it exists but is not within the prosecutor's possession, custody, or control…

Id. (emphases added). Still, if the prosecution knows of discoverable materials in their possession, but does not make them available to the defense, they may be deemed ready anyway if they show the missing items are "lost, destroyed, or otherwise unavailable." C.P.L. § 245.50(3). Or the prosecution can apply to the court for an extension of time under various statutory exceptions. See People v. Aquino, 72 Misc.3d 518, 523 (Crim. Ct. Kings Co. 2021) (summarizing the available exceptions); see also People v. Quinlan, 71 Misc.3d 266, 271 (Crim. Ct. Bronx Co. 2021). "What the People may *not* do is file a Certificate of Compliance in which they claim to have exercised due diligence and turned over 'all known material and information,' while at the same time *not actually turning over* all known material and information, without the express permission of the Court." People v. Adrovic, 69 Misc.3d 563, 574 (Crim. Ct. Kings Co. 2020) (emphases added).

Thus, a prosecutor's failure to provide all discoverable materials, and to exercise due diligence in ascertaining those materials, renders a certificate of compliance invalid. See Aquino, 72 Misc.3d at 525 ("[D]iscovery compliance is a question of diligence and reasonableness given the particular facts of the case"); People v. Hincapie, Ind. 1425/2019, slip op. at 4 (Sup. Ct. N.Y. Co. 2020) (attached) ("The question … is whether the People have exercised the due diligence required"); Adrovic, 69 Misc.3d at 574 ("[W]here the prosecutor has failed to demonstrate diligence and reasonableness in obtaining and disclosing required information and, as a result of that lack of diligence and reasonableness has failed to make a necessary disclosure, then the

Certificate of Compliance is invalid"); see also People v. Demonia, 2022 N.Y. Slip Op. 22035, *4 (Co. Ct. Ulster Co. 2022); People v. Cuzco-Chauca, No. CR-010871-21QN, slip op. at 4 (Crim. Ct. Queens Co. 2021) (Gershuny, J.) (attached); People v. Brickus, 2021 N.Y. Slip Op. 51078(U), *2 (Crim. Ct. N.Y. Co. 2021); People v. Ramirez, 73 Misc.3d 664, 668 (Crim. Ct. N.Y. Co. 2021); People v. Georgiopoulos, 2021 N.Y. Slip Op. 50380, *3 (Sup. Ct. Queens Co. 2021) (Lopez, J.).

B. In This Case, the Certificate of Compliance Is Improper Because Discoverable Items Were Late or Refused, and the Prosecution Has Not Demonstrated Due Diligence or Reasonableness in Filing the Certificate.

1. Police Disciplinary Records

C.P.L. § 245.20(1)(k) requires the prosecution to make available "all evidence and information" that "tends to" (ii) "reduce the degree of or mitigate the defendant's culpability as to a charged offense," (iv) "impeach the credibility of a testifying prosecution witness," and (vii) "mitigate punishment." Many courts across New York State have held that the records underlying both substantiated and unsubstantiated disciplinary allegations are automatically discoverable.[2]

In this case, the prosecution should have provided the complete records underlying the disciplinary history of the police officers in the case. The certificate of compliance, page 2, designates POs Daniele Petito, Diego Gutierrez, and Russell Lerch as potential witnesses. For each

[2] See, e.g., Cuzco-Chauca, No. CR-010871-21QN, slip op. at 3 (ordering disclosure of all IAB records); People v. Daniels, Ind. No. 1176-2020, slip. op. at 1 (Sup. Ct. Queens Co. 2021) (Zaro, J.) (attached) (ordering prosecution to turn over "all CCRB investigation reports and any other underlying records"); People v. Surgick, 2021 N.Y. Slip Op. 51007(U), *3 (City Ct. Albany Co. 2021) (ordering prosecution to turn over all impeachment material concerning law enforcement witnesses); People v. Pennant, 73 Misc.3d 753, 760 (Dist. Ct. Nassau Co. 2021) (prosecution's obligation under C.P.L. § 245.20[1][k] includes "any record created in furtherance of a law enforcement disciplinary proceeding"); People v. Edwards, 2021 N.Y. Slip Op. 21372, *5-6 (Crim. Ct. N.Y. Co. 2021) (ordering prosecution to disclose records underlying both substantiated and unsubstantiated allegations); People v. McKinney, 2021 N.Y. Slip Op. 50456(U), *6 (Crim. Ct. Kings Co. 2021) ("[D]isclosure of the underlying records for substantiated and unsubstantiated, and not just summaries of misconduct, is required"); People v. Castellanos, 72 Misc.3d 371, 375 (Sup. Ct. Bronx Co. 2021) ("Because misconduct complaints may, in fact, be impeachment material [at least those complaints that have been substantiated or unsubstantiated], a summary that gives only a general description of that misconduct is not sufficient"); People v. Perez, 2021 N.Y. Slip Op. 50374(U), *5 (Crim. Ct. Bronx Co. 2021) (ordering prosecution to "disclose the full substantiated and unsubstantiated personnel records, in their possession, for all officers herein to comply with their discovery obligation").

officer, the prosecution provided a "LEOW Letter" which states the name and date of each allegation. PO Petito has some unsubstantiated allegations; PO Gutierrez has a pending Civilian Complaint Review Board (CCRB) allegation, four substantiated Internal Affairs Bureau (IAB) allegations, and some unsubstantiated allegations; and PO Lerch has a substantiated IAB allegation and some unsubstantiated allegations.

For the pending CCRB allegation against PO Gutierrez, no records were provided. For the IAB allegations for each officer, the prosecution only provided NYPD "personnel index sheets," which simply restate the information that is contained in the LEOW Letters. See, e.g., Exhibit B (NYPD personnel index sheet for PO Gutierrez). These documents do not satisfy the prosecution's discovery obligation because they do not consist of the entirety of the materials produced as part of these investigations. They do not even contain the basic underlying facts of each allegation, let alone any other details or materials. Indeed, the documents are so thin and void of information that it is *objectively unreasonable* to file a certificate of compliance with only these disclosures.

In reply, the prosecution explains that they "disclosed the documents that I have and which I believe are discoverable." See Exhibit A, at 2. But the prosecution had a duty to exercise due diligence and make reasonable inquiry to ascertain, place in their actual possession, and make available the entire set of materials produced as part of these investigations. C.P.L. §§ 245.50(1), 245.20(2), 245.55(1). "Whether something is impeachment material is not the call of the People – or even the court – but rather defense counsel." People v. Eddahani, No. CR-011552-21QN, slip op. at 8 (Crim. Ct. Queens Co. 2021) (Gershuny, J.) (attached). Moreover, C.P.L. § 245.20 "does not concern the People's rationale for failing to disclose. It requires simply that the People disclose discoverable information and material…" People v. Williams, 2021 N.Y. Slip Op. 50986(U), *1 (Crim. Ct. N.Y. Co. 2021). And considering the sizable caselaw on this issue, the prosecution was

"on notice of the peril of their nondisclosure" of these records at the time of filing. Id. at *2. For all these reasons, the prosecution has not demonstrated due diligence or reasonableness in filing the certificate of compliance.

2. [SECTION OMITTED]

3. Gas Chromatography Records

C.P.L. § 245.20(1)(s) requires the prosecution to disclose "all records of calibration … utilized to perform any scientific tests and experiments," including "the records of gas chromatography related to the certification of all reference standards". In this case, PO Russell Lerch administered a chemical breath test to [REDACTED] using an Intoxilyzer 9000 machine. The prosecution provided gas chromatography records for one simulator solution, lot no. 21280. But the provided discovery reveals that the calibration of the specific Intoxilyer 9000 used in this relied upon five additional lots of simulator solution, nos. 20070, 20060, 20430, 20030, and 21100. The prosecution should have provided records for these lots because they are part of the "records of calibration" and "certification of all reference standards" for the machine used in this case; they speak to the accuracy and proper functioning of the machine.

The prosecution argues that the materials are not discoverable, leaning solely on the persuasive authority of People v. Alvarez, 2021 N.Y. Slip Op. 50292(U) (Sup. Ct. Queens Co. 2021). Exhibit A, at 1. But the substance of the Alvarez Court's analysis consists of a single conclusory statement that gas chromatography records "not used in the breath test performed" are not "related" to the subject matter of the case. This statement is not persuasive and does not address or refute the argument that such records do relate to the case because they underlie the calibration of the machine that was used. It also ignores the "presumption in favor of disclosure" enshrined by the discovery scheme. C.P.L. § 245.20(7).

Notably, in Alvarez, the prosecution *did* provide the requested gas chromatography records. According to the court, that is "because they [the prosecution] had access to them." 2021 N.Y. Slip Op. 50292(U), at *7. Here, the prosecution states that they were in actual possession of records for two simulator solution lots, nos. 21100 and 20430, and provided them "in the spirit of openness" upon prompting from defense counsel. Exhibit A, at 1-2. But the prosecution has access to *all* gas chromatography records because the records are in the possession of law enforcement and thus are in the possession of the prosecution. C.P.L. §§ 245.20(2), 245.55(1). The prosecution had a duty to place those records in their actual possession and make them available to [REDACTED], which they have not done. It is *objectively unreasonable* to refuse these materials. Therefore, the prosecution has not demonstrated due diligence and reasonableness in filing the certificate.

4. [SECTION OMITTED]

C. Conclusion

Ultimately, the question is one of readiness: has the prosecution "done all that is required of them to bring the case to a point where it may be tried"? People v. Sibblies, 22 N.Y.3d 1174, 1177 (2014), quoting People v. England, 84 N.Y.2d 1, 4-5 (1994). After all, C.P.L. § 30.30 "contemplates an indication of *present* readiness, not a prediction or expectation of future readiness." People v. Kendzia, 64 N.Y.2d 331, 337 (1985) (emphasis added). Here, the prosecution failed to disclose known discoverable items that were in their possession prior to filing the certificate of compliance. Nor has the prosecution demonstrated due diligence or reasonableness in filing the certificate or complying with their ongoing discovery obligations. "A certificate of 'compliance' in name only will not shield the People from the application of the speedy trial statutes," Aquino, 72 Misc.3d at 527, and it should not here. Because the certificate of compliance was improper, the statement of readiness was invalid and did not toll the speedy trial clock.

Applicant Details

First Name	**Kevin**
Last Name	**Kehne**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **801 N Monroe Street** **City** **Arlington** **State/Territory** **Virginia** **Zip** **22201** **Country** **United States**
Contact Phone Number	**5164049565**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2017**
JD/LLB From	**George Mason University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54701&yr=2011**
Date of JD/LLB	**May 19, 2023**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**George Mason Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**2022-2023 Moot Court Nationals Team** **Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

KEVIN KEHNE
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June 8, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East, Room S905
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a recent graduate of George Mason University Antonin Scalia Law School. I am writing to apply for a clerkship in your chambers beginning in October 2025, after I complete a clerkship with Judge Steven J. Menashi of the United States Court of Appeals for the Second Circuit for the 2024–2025 term.

During my time at Scalia Law School, I pursued professional and academic opportunities to prepare myself for a clerkship after graduation. As an intern for Judge Dabney L. Friedrich of the United States District Court for the District of Columbia, I conducted legal research and drafted memoranda on matters such as workplace discrimination, standing to challenge agency action, and securities laws. I also had the opportunity to observe case updates from Judge Friedrich's law clerks. This experience provided valuable insight into the day-to-day responsibilities of a law clerk and confirmed my interest in clerking after law school. As a Senior Articles Editor for the *George Mason Law Review*, I developed my legal writing and editing skills by selecting and editing articles for publication. Last year, the *George Mason Law Review* recognized my legal writing with the 2021 Top Law Review Write-On Submission award. Additionally, I gained experience in legal research as a Research Assistant for Professor Michael Greve by synthesizing case law and secondary sources in the areas of federalism and non-delegation. While managing these different responsibilities, I maintained a 4.16 GPA, ranking first in my class.

I am enclosing my resume, transcript, letters of recommendation, and writing sample for your review. Thank you for your time and consideration, and I look forward to hearing from you.

Sincerely,

Kevin Kehne

Enclosures

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EDUCATION

George Mason University Antonin Scalia Law School, Arlington, VA
Juris Doctor, *summa cum laude*, May 2023

Class Rank:	Top 1% (1/163); GPA: 4.16/4.33
Activities:	*George Mason Law Review*, Vol. 30 Senior Articles Editor
	Moot Court Nationals Team, Member
Honors:	Scalia Law Class of 2023, Outstanding Academic Achievement in Antitrust Law
	2023 National Appellate Advocacy Competition, Boston Regional Champions
	2022 Billings, Exum, & Frye National Moot Court Competition, First Place
	2021 Scalia Law Moot Court Board Upper Class Competition, Semifinalist
	2021 Scalia Law Moot Court Board First Year Competition, Semifinalist
	2021 Scalia Law Top Law Review Write-On Submission

New York University, New York, NY
Bachelor of Science, *summa cum laude*, Sports Management, May 2017

Class Rank:	Top 5%; GPA: 3.95/4.00

EXPERIENCE

The Honorable Steven J. Menashi, United States Court of Appeals for the Second Circuit,
New York, NY
Law Clerk (Beginning Summer 2024)

Covington & Burling LLP, Washington, D.C.
Associate (Beginning Fall 2023); *Summer Associate* (May 2022–July 2022)

The Honorable Dabney L. Friedrich, United States District Court for the District of Columbia,
Washington, D.C.
Judicial Intern (January 2022–April 2022)
Conducted legal research and drafted memoranda on cases assigned to Judge Friedrich. Assisted law clerks by reviewing and editing draft opinions. Checked citations for legal support and proper formatting.

D.C. Bar Pro Bono Center, Washington, D.C.
Law Clerk (May 2021–July 2021)
Drafted memoranda used by volunteer attorneys during consultations with small businesses and nonprofits. Provided legal research on commercial leases, employment law, and business entity formation. Conducted intake interviews with potential clients.

The Headfirst Companies, Washington, D.C.
Marketing Associate (October 2018–August 2020)
Created and executed marketing campaigns. Analyzed enrollment trends and customer demographics. Researched changes to NCAA regulations. Drafted and edited blog posts for the company website.

ZogSports, New York, NY
Corporate Business Growth Manager (June 2017–October 2018)
Managed corporate sports leagues in New York City. Drafted email campaigns to increase sales and retention rates. Negotiated leases for facilities. Organized a training program on sales and prospecting.

Academic Transcript

G01283191 Kevin R. Kehne
Jun 05, 2023 08:34 am

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit **Transcript Totals**

Transcript Data
STUDENT INFORMATION

Name : Kevin R. Kehne

Curriculum Information

Current Program
Juris Doctor

College: Antonin Scalia Law School
Major: Law

This is NOT an Official Transcript

DEGREE AWARDED

Graduation Intent Filed: Juris Doctor **Degree Date:**

Curriculum Information

College: Antonin Scalia Law School
Major: Law

INSTITUTION CREDIT **-Top-**

Term: Fall 2020
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	096	LW	Intro to Lgl Res Writ &	A+	2.000	8.66	
LAW	102	LW	Contracts I	A-	2.000	7.34	
LAW	104	LW	Property	A	4.000	16.00	
LAW	108	LW	Economics for Lawyers	A	3.000	12.00	

LAW	110	LW	Torts	A	4.000	16.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	60.00	4.00
Cumulative:	15.000	15.000	15.000	15.000	60.00	4.00

****Unofficial Transcript****

Term: Spring 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	097	LW	Trial-Level Writing	A+	3.000	12.99	
LAW	103	LW	Contracts II	A+*	3.000	12.99	
LAW	106	LW	Criminal Law	A+	3.000	12.99	
LAW	112	LW	Civil Procedure	A+	4.000	17.32	
LAW	266	LW	Legislation & Statutory Interp	A+*	2.000	8.66	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	64.95	4.33
Cumulative:	30.000	30.000	30.000	30.000	124.95	4.17

****Unofficial Transcript****

Term: Fall 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	098	LW	Appellate Writing	A	2.000	8.00	
LAW	116	LW	Administrative Law	A+	3.000	12.99	
LAW	121	LW	Const Law I-Structure of Gov't	A+	4.000	17.32	
LAW	156	LW	Antitrust I: Principles	A+	3.000	12.99	
LAW	510	LW	Scholarly Writing	CR	2.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	12.000	51.30	4.28

Cumulative:	44.000	44.000	44.000	42.000	176.25	4.20

****Unofficial Transcript****

Term: Spring 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	099	LW	Legal Drafting (Legis. - Reg.)	A+	2.000	8.66	
LAW	158	LW	Const Lw II:14th Amendment	A	3.000	12.00	
LAW	162	LW	Antitrust II: Applications	A+	3.000	12.99	
LAW	226	LW	Federal Courts	B+	3.000	9.99	
LAW	298	LW	Professional Responsibil	B+	2.000	6.66	
LAW	321	LW	Supervised Externship (E)	CR	3.000	0.00	
LAW	511	LW	Law Journal Mgt - Law Review	CR	1.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	17.000	17.000	17.000	13.000	50.30	3.87
Cumulative:	61.000	61.000	61.000	55.000	226.55	4.12

****Unofficial Transcript****

Term: Fall 2022

Term Comments: Class Standing: 1/163

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	159	LW	Appellate Advocacy (E W)	A	2.000	8.00	
LAW	164	LW	Freedom of Speech & 1st Amend	A+	3.000	12.99	
LAW	172	LW	Business Associations	A+	4.000	17.32	
LAW	206	LW	Crim Procedure: Investigation	A+	3.000	12.99	
LAW	238	LW	Independent Study	A	2.000	8.00	
LAW	612	LW	FTC Seminar	A+	2.000	8.66	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	67.96	4.25

Cumulative:	77.000	77.000	77.000	71.000	294.51	4.15

****Unofficial Transcript****

Term: Spring 2023

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	120	LW	Civil Rights Prosecutions	A+	3.000	12.99	
LAW	159	LW	Appellate Advocacy (E W)	A+	2.000	8.66	
LAW	212	LW	Family Law	A	4.000	16.00	
LAW	238	LW	Independent Study	A+	3.000	12.99	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	50.64	4.22
Cumulative:	89.000	89.000	89.000	83.000	345.15	4.16

****Unofficial Transcript****

TRANSCRIPT TOTALS (LAW) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	89.000	89.000	89.000	83.000	345.15	4.16
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	89.000	89.000	89.000	83.000	345.15	4.16

****Unofficial Transcript****

RELEASE: 8.7.1

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this letter of application for a student I taught in Property Law, Kevin Kehne. You can easily perceive, given the list of A+ and A+* (i.e., highest class grade) on his resume, that Kevin is a natural legal mind. I would like to draw attention to several other qualities.

I taught Kevin during Covid in a classroom where 50% of students showed up in person, and 50% remained online. I believe I observed a selection mechanism (not respecting students choosing to remain overseas) in these choices: the most motivated students came every day to the building and participated far more often in class discussions than did the students online, even though the classroom technology made online participation very easy.

Kevin showed up in person every day. He was always prepared “to the teeth,” and participated in class discussions at a notably superior level, both during cold calls and as a volunteer. He did not grandstand but rather waited often until others could no longer assist the discussion before jumping in with excellent interventions.

Kevin is also very “low key,” in his manner. He does not show stress – if indeed he is feeling any! He uses clear and logical arguments. He asks terrific questions – not constantly in class – but after thoughtful reflection on some seeming contradiction or inconsistency in the material. He is genuinely gifted as a legal analyst. He is also gifted with the ability clearly to express his ideas. His legal writing grades are very high, and his writing in my Property exam was a standout. Most students ramble in an exam, even if they are in the right “forest.” Kevin’s writing was as organized as a legal brief.

Finally, Kevin previously interned at the U.S. District Court for the District of Columbia, gaining wonderful experience of the work of judges and law clerks. He is also already gaining substantive experience in researching, editing, and drafting opinions.

I am happy to answer any additional questions you might have about Kevin. I can be reached at halvare@gmu.edu or 703 993 9845.

With best regards,

Helen M. Alvarè
The Robert A. Levy Chair in Law & Liberty

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

March 1, 2022

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Kevin R. Kehne

Dear Judge Matsumoto:

I write this letter of recommendation in support of Kevin Kehne's application to be a law clerk. Kevin has been among the top three students that I have had in my four years at Scalia Law. He ranks first in his class and compares favorably with the top students at any elite law school. I strongly recommend that you hire him.

Kevin was a student in my torts class in Fall 2020 and in my criminal law class in Spring 2021. Both were typical first-year courses. Torts covered a range of topics from the underlying philosophy of tort law to the legal doctrine in intentional torts, negligence, and strict liability. Students were evaluated based on their midterm and final exam performance. Criminal law covered philosophy of punishment, the general part of criminal law, and the definition of specific crimes. Students were evaluated solely based on their final exam performance. Both exams tested a combination of black-letter law (through multiple-choice questions), issue spotting, and academic analysis (through policy or philosophy questions).

Kevin earned an A in Torts, finishing fifth out of 49 students. Kevin did extremely well on the black-letter-law/multiple-choice questions and on the issue-spotting essay. Kevin's worst grade came on the midterm, in which he got an A-. Were it not for that exam, his final grade would have been an A+.

Although Kevin started at a high level, he improved as the academic year progressed. In the Spring, Kevin earned an A+ in Criminal Law, finishing first out of 27 students. He excelled at every component of the exam. His issue-spotting essay was nearly three standard deviations above the mean. His answers were well-written and logically organized. His final grade was two standard deviations above the mean, a full standard deviation above the student in second place.

Kevin's overall academic performance has been outstanding. In three semesters of law school, his lowest grade is a single A- in first-semester Contracts. Kevin finished that first semester with a 4.0 GPA. For him, that was rock bottom. Since then, Kevin has received eight grades of A+ or A+*, and only one ordinary A. (A+* grades are issued rarely and require a special justification.)

Kevin is our top student in the Class of 2023. He was great to have in class and would make a valuable addition to chambers.

Of the areas that may present some difficulty when hiring, Kevin is less ideological than most current law students. Politically and judicially moderate, he does not fit neatly into either any political or jurisprudential camp. But I hope that will not be a bar to hiring him. As I have said, he is among the top students I have had in four years of law teaching. He will make a terrific clerk.

If you wish to talk about Kevin further, please feel free to contact me at (610) 745-0247 or rleider@gmu.edu. Kevin receives my highest recommendation.

Sincerely,

Robert Leider
Assistant Professor

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I understand that Mr. Kevin Kehne has applied for a clerkship with your chambers. I am pleased to submit a letter of recommendation in support of his application—especially since this particular letter writes itself.

Mr. Kehne is the best student in his class, and perhaps the best student I have taught in over in decade at Antonin Scalia Law School. He has been a student in three of my classes (Legislation, Constitutional Law I, Administrative Law) and is now enrolled in a fourth (Federal Courts). He has served, and continues to serve, as one of my research assistants. He is also a member of a small discussion group, called Random Walk on Law Street, that meets at my home once a month over pizza and beer to discuss legal texts we would not ordinarily encounter in the course of legal education or practice, from Grant Gilmore to GWF Hegel. (I created that cabal, consisting of downtown lawyer friends, federal law clerks, and invited students, to compensate in some small measure for the students' lost social and networking opportunities during Covid.) In flip summation: I know this cat.

Mr. Kehne earned an A+ in each of the three aforementioned classes. These are not grades earned on a curve; they are actual grades. The A+* in Legislation merits a brief explanation. Because the exam was administered remotely, faculty were instructed to report any suspicious exams to the administration. Mr. Kehne's exam—by coincidence, the first that I looked at—did look suspicious. His answer to a rather involved hypo, presenting a conflict between Chevron and a half-dozen countervailing canons, looked like something a good Covington & Burling associate might produce in a day. No 1-L, I thought, can do that in two hours. Thus, I dutifully reported that the exam might have been compromised. My concerns were assuaged when I learned that most other students in that class had difficulties with the exam and, moreover, that Mr. Kehne had pulled the same performance in Professor Michelle Boardman's Contracts II class. He fully deserved the rarely awarded, exceptional grade in both classes.

Mr. Kehne took Constitutional Law and Administrative Law in a single semester. For ordinary students that heavy lift rarely ends well; Mr. Kehne, as mentioned, aced both classes. By the same token, 2-L's hardly ever do well in Federal Courts. I have not the slightest doubt that Mr. Kehne will prove to be the rare exception.

Mr. Kehne is not a very active participant in class. Instead, he takes copious notes, often by hand. I call on him only when I need the correct answer, to move the discussion along; and invariably, I get that answer. His notes serve as study guidance; they never get clipped into an exam. It's all, "here is your question, here is my best answer." Mr. Kehne writes a like a charm, with precision and without adornments or opinionating. He is a superb research assistant—prompt, diligent, and thorough.

Mr. Kehne's personal and professional conduct is impeccable. In our relatively small classes every student knows that he is off the charts; still, he freely shares his time and insights in a study group with students who might need a bit of help. In that same spirit of cheerful humility, Mr. Kehne readily accepts occasional criticism and correction. Upon reviewing his A+ Administrative Law exam with me, Mr. Kehne promptly acknowledged a small glitch and volunteered: not my finest hour. Perhaps not. Then again also not Justice Scalia's finest hour, on that particular issue. You're excused, counselor.

A clerkship with your chambers would be a very important step in Mr. Kehne's career. You would find him a supremely qualified law clerk who will more than hold his own among students from much higher-ranked law schools.

I would be delighted to supply further information. Thank you in advance for your kind consideration.

Sincerely,

Michael Greve
Professor of Law

Michael Greve - mgreve@gmu.edu

KEVIN KEHNE
801 N Monroe Street, Arlington, VA 22201
516-404-9565 | kkehne@gmu.edu

WRITING SAMPLE

The following writing sample is an excerpt from a brief written for the 2022 Billings, Exum, & Frye National Moot Court Competition. I was responsible for writing the brief on behalf of the Respondent, University of North Greene. The case presented two issues: (1) whether the Supreme Court should overturn *Grutter v. Bollinger*, 539 U.S. 306 (2003), and prohibit universities from considering race as a factor in admissions; and (2) whether North Greene's consideration of race in its admissions process violated the Equal Protection Clause. This writing sample includes the Summary of the Argument and Argument for the first issue. The full brief is available upon request.

No. 22-2020

IN THE

Supreme Court of the United States

ADVOCATES FOR FAIR ADMISSIONS PRACTICES, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH GREENE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR RESPONDENT

Team 25
Counsel for Respondent

SUMMARY OF THE ARGUMENT

Education plays a vital role in our society. Institutions of higher education help develop the future leaders of this country and prepare students for the diverse society that awaits them after graduation. This Court has long held that diversity enhances this educational experience, and universities have a compelling interest in attaining the benefits that flow from diversity. Ideally, universities could achieve this compelling interest without considering race in admissions. At this point, however, "race unfortunately still matters." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). North Greene recognized this reality when faced with the difficult task of creating its admissions program. To achieve the benefits of student body diversity, North Greene crafted a complex, thorough review process that values all kinds of diversity. This Court should reaffirm *Grutter* and hold that North Greene's admissions policy does not violate the Fourteenth Amendment's Equal Protection Clause.

I. *Grutter* correctly held that universities may use race in a narrowly tailored manner to achieve the educational benefits flowing from student body diversity. Far from being egregiously wrong, *Grutter*'s holding is supported by the original meaning of the Fourteenth Amendment, education's essential societal function, and this Court's long line of equal protection cases. Courts have consistently applied this well-reasoned standard, in turn creating clear guidelines for universities to follow. Several industries have followed this Court's lead by embedding diversity into their core values and seeking out graduates from diverse educational settings. Overturning *Grutter* would have profoundly negative consequences on these developments.

*****The remainder of this section is omitted. The full brief is available upon request.*****

ARGUMENT

I. This Court Should Reaffirm *Grutter* and Allow Institutions of Higher Education to Consider Race as a Factor in Admissions.

Parties arguing to overturn precedent bear a heavy burden in showing that the Court should depart from its previous holding. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). In matters of constitutional interpretation, a departure from precedent "demands special justification." *Id*. (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). "Ambiguous historical evidence" will not suffice. *Id.* (quoting *Welch v. Tex. Dep't. of Highways and Pub. Transp.*, 483 U.S. 468, 479 (1987)); *see* Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1711 (2013) ("Uncertainty . . . counsels retention of the status quo."). Rather, this Court must find its prior holding was "grievously or egregiously wrong." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part). When evaluating precedent, this Court weighs "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Id.* at 1405 (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)).

Each of these considerations points in the same direction: *Grutter* was correct the day it was decided and remains so today. *Grutter*'s reasoning aligns with the text and original understanding of the Fourteenth Amendment, neither of which suggest the Equal Protection Clause prohibits all race-conscious admissions policies. *See infra* Section I.A. *Grutter* also correctly identified the educational benefits that flow from student body diversity as a compelling interest—a holding this Court reaffirmed just six years ago. *See Fisher v. Univ. of Tex. at Austin* ("*Fisher II*"), 579 U.S. 365, 381 (2016). These cases provide a workable standard for evaluating admissions policies and have engendered serious reliance interests across society.

See infra Sections I.B–C. Far from showing "special justification" for overturning precedent, *Gamble*, 139 S. Ct. at 1969, these considerations support reaffirming *Grutter*.

A. The Constitutional Text, History, and Precedent Support *Grutter*'s Reasoning.

1. The Equal Protection Clause's Original Meaning Does Not Prohibit All Consideration of Race.

The Fourteenth Amendment's Equal Protection Clause provides that a state shall not "deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court has never understood this broad language to prohibit all racial classifications. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). Rather, both the text and original understanding of the Fourteenth Amendment demonstrate that the Equal Protection Clause permits race-conscious measures.

Constitutional interpretation begins with the text. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 189 (1804)). The Equal Protection Clause includes no express reference to state action based on race, and the Amendment's Framers rejected several proposals that featured such language. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 275–81 (1997). For example, one proposed amendment prohibited states from "in any manner recogniz[ing] any distinction between citizens *on account of race or color* or previous condition of slavery." Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (emphasis added). The Senate overwhelmingly rejected this language, with only seven votes in favor of it compared to thirty-eight against it. *Id.* Thus, the Amendment's Framers rejected "an all-too-unyielding insistence that race cannot be a

factor" in any state action. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

Actions by the Thirty-Ninth Congress confirm this interpretation of the Equal Protection Clause. "Historical evidence sheds light not only on what the draftsmen intended . . . but also on how they thought that [constitutional provision] applied to the practice [Congress] authorized." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). In other words, "their actions reveal intent." *Id.*; *see also N.Y. State Rifle & Pistol Ass'n. v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022) (using historical practice to determine the scope of the Second Amendment and explaining that this approach "accords with how we protect other constitutional rights"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2258 (2019) (citing federal and state acts in the nineteenth century, including education expenditures by the Freedmen's Bureau, to interpret the First Amendment); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014) (placing "significant weight upon historical practice" to interpret the Recess Appointments Clause).

The Fourteenth Amendment's Framers enacted several race-conscious statutes around the time of the Amendment's adoption. For example, the Freedmen's Bureau Act of 1866 authorized the federal government to assist African Americans by appropriating funds for educational purposes and reserving land. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 762 (1985). Moreover, the Bureau had the authority to "aid blacks in almost any manner related to their newly-won freedom, [but] white refugees could be provided only that assistance necessary to make them self-supporting." *Id.* at 772. Despite objections that the Act constituted "class legislation," Congress passed the Act by a wide majority in both houses. *Id.* at 763, 774–75. Similarly, the next Congress passed a law appropriating funds to assist "destitute colored persons" in Washington, D.C. *See* Jed Rubenfeld,

Affirmative Action, 107 Yale L. J. 427, 430–31 (1997). State legislatures followed suit, passing race-based legislation to similarly protect African Africans. *See, e.g.*, 1870 S.C. Acts No. 279, §§1, 7 (statute shifting the burden of proof to the defendant when a "colored or black" plaintiff claimed an unlawful act); 1871 Ky. Acts ch. 1340, §§2, 7 (law permitting counties to aid "all [destitute] colored persons"); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 548–49 (1998) (discussing an Illinois law imposing a fine for "prevent[ing] any colored child entitled to attend a public school in this state from attending such school").

When Congress passes an amendment and a separate statute contemporaneously, "[i]t can hardly be thought . . . they intended [the amendment] to forbid what they had just declared acceptable." *Marsh*, 463 U.S. at 790. This historical evidence shows the Fourteenth Amendment's Framers understood the Equal Protection Clause to allow race-conscious measures. At the very least, it refutes any notion that Congress unquestionably intended a *per se* rule against such measures. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (describing the Fourteenth Amendment's historical record as "inconclusive"). Since this Court requires more than historical ambiguity to overrule precedent, *see Gamble*, 139 S. Ct. at 1969, the Equal Protection Clause's text and original meaning weigh in favor of reaffirming *Grutter*.

2. *Grutter* Correctly Held That Institutions of Higher Education Have a Compelling Interest in the Benefits That Flow from a Diverse Student Body.

Over the last twenty years, this Court has repeatedly held that universities have a compelling interest in the educational benefits flowing from a diverse student body. *See Fisher II*, 579 U.S. at 381; *Fisher v. Univ. of Tex. at Austin* ("*Fisher I*"), 570 U.S. 297, 310 (2013); *Grutter*, 539 U.S. at 343. This holding was correct in *Grutter* and remains correct today.

Education is "perhaps the most important function of state and local governments" and "the very foundation of good citizenship." *Brown*, 347 U.S. at 493. It plays "a fundamental role in maintaining the fabric of our society" and promoting the goals of the Equal Protection Clause. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). The Fourteenth Amendment's Framers viewed education as a way to "obliterate[] prejudices, "dissolve[] falsehoods," and "open[] all doors" to its citizens. Cong. Globe, 39th Cong., 1st Sess., 586 (1866) (statement of Rep. Donnelly). Congress further emphasized this belief through the Freedmen's Bureau by funding educational opportunities for African American students. Schnapper, 71 Va. L. Rev. at, 762, 772.

This Court has long recognized that student body diversity contributes to education's important societal function. A student's "diminished ability to receive an education in a racially integrated school [ ] is, beyond any doubt . . . one of the most serious injuries recognized in our legal system." *Allen v. Wright*, 468 U.S. 737, 756 (1984). To properly prepare the next generation of leaders, institutions of higher education "cannot be effective in isolation." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Rather, they must provide "wide exposure to the ideas and mores of students as diverse as this Nation." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312–13 (1978) (Powell, J.) (internal quotation marks omitted) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). By providing students with exposure to different viewpoints, universities achieve "qualities which are incapable of objective measurement but which make for greatness." *Fisher II*, 579 U.S. at 388 (quoting *Sweatt*, 339 U.S. at 634).

Grutter followed these principles in holding that universities have a compelling interest in the educational benefits that flow from a diverse student body. This Court acknowledged the "fundamental role" education plays in "preparing students for work and citizenship." 539 U.S. at 331 (citing *Plyler*, 457 U.S. at 221). For education to serve this purpose, "the diffusion of

knowledge and opportunity . . . must be accessible to all individuals regardless of race and ethnicity." *Id.* Echoing the comments of the Fourteenth Amendment's Framers, this Court explained that a diverse learning environment "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Id.* at 330 (internal quotation marks and citation omitted). In turn, a diverse learning environment allows universities to "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Id.* at 332.

These benefits were—and still are—sufficient for universities to have a compelling interest in the benefits that flow from student body diversity. *Grutter*'s reasoning has not "sustained serious erosion." *See Lawrence v. Texas*, 539 U.S. 558, 576 (2003). On the contrary, the lower courts found these features remain prominent in higher education. The Fourteenth Circuit cited the King Report, which identified four goals North Greene pursued by considering race in its admissions process: (1) training future leaders; (2) preparing graduates for a pluralistic society; (3) creating a better learning environment; and (4) providing students with new knowledge through exposure to different perspectives. R. at 20. Bringing together a diverse student body allowed North Greene students and professors to expand their views and have conversations that would not occur in a homogenous environment. R. at 13. Furthermore, student body diversity helps North Greene to attract and train future leaders by "demonstrat[ing] to the world that individuals of all races, ethnicities, all backgrounds may thrive, succeed, and lead" at the university. R. at 12. North Greene's experience shows *Grutter*'s reasoning remains sound, and the educational benefits that flow from student body diversity remain a compelling interest.

3. *Grutter* Is Consistent with This Court's Equal Protection Jurisprudence.

Grutter applied strict scrutiny to evaluate the constitutionality of a law school's admissions policy. 539 U.S. at 326–27. Yet, despite applying this familiar framework, AFAP claims *Grutter* is inconsistent with *Brown* and other precedents. However, *Grutter* comports with this Court's broader equal protection jurisprudence, and *Brown* does not require this Court to overrule *Grutter*.

The Constitution permits racial classifications that are narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 230 (1995). Although this sets a high bar, this Court has never held the Constitution creates a *per se* rule against racial classifications. Rather, strict scrutiny "takes relevant differences into account" as part of an exacting examination of the challenged policy. *Id.* at 228.

Grutter did exactly that. After identifying a compelling interest served by the law school's admissions policy, this Court analyzed whether the school narrowly tailored its policy to further that interest. 539 U.S. at 334. The admissions policy did not create a quota system or award minorities a predetermined number of points. *Id.* at 334–38 (comparing the school's admissions policy to the policies at issue in *Bakke* and *Gratz v. Bollinger*, 539 U.S. 244 (2003)). It simply used race in a "flexible, nonmechanical" manner as part of an "individualized, holistic review" process. *Id.* at 334, 337. These differences separated the law school's policy from those previously struck down by the Court. Moreover, this Court proceeded to consider whether the law school had any workable race-neutral alternatives and whether the admissions policy unduly harmed any particular groups. *Id.* at 339–41. This Court upheld the admissions policy only after this thorough review uncovered no unconstitutional features. *Id.* at 343–44.

If this Court prohibits universities from considering race as a factor in admissions, the constitutional standard for university admissions policies would be at odds with the standard for racial classifications in other contexts. Outside of education, this Court has consistently applied strict scrutiny to race-based classifications. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 515 (2005) (holding strict scrutiny applied to a CDC prison housing policy); *Bush v. Vera*, 517 U.S. 952, 976 (1996) (applying strict scrutiny to redistricting plans based on race); *Adarand Constructors*, 515 U.S. at 238 (holding strict scrutiny applied to a subcontractor compensation clause); *Loving v. Virginia*, 388 U.S. 1, 11 (1954) (applying strict scrutiny to a state law prohibiting interracial marriage). *Grutter* is faithful to this approach, and this Court should decline to fracture its equal protection jurisprudence by holding university admissions policies to a different standard.

Brown also does not require a contrary result. As an initial matter, this Court has never understood *Brown* to bar all consideration of race in state action. *See, e.g.*, *Parents Involved*, 551 U.S. at 745 (plurality opinion) (explaining that the constitutional violation in *Brown* was "legally separating children based on race," not the mere consideration of race); *Milliken v. Bradley*, 418 U.S. 717, 737 (1974) (describing the "target of the *Brown* holding" as "the elimination of state-mandated or deliberately maintained dual school systems"); *see also Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) ("In the real world, [a color-blind Constitution] cannot be a universal constitutional principle."). *Brown* held that "*segregation* of children in public schools *solely on the basis of race*" violates the Equal Protection Clause. 347 U.S. at 493 (emphasis added). The policy at issue in *Grutter*—a policy using race as one of many factors to increase student body diversity—hardly compares to the categorical segregation *Brown* prohibited. *See* Stephen L. Carter, *When Victims Happen To Be Black*, 97 Yale L.J. 420, 433–434 (1988).

Grutter does not conflict with *Brown*; it promotes "*Brown*'s objective of equal educational opportunity." *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

B. *Grutter* Provides a Workable Standard to Evaluate Admissions Policies.

A precedent provides a workable standard if "it can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272. By reviewing the challenged admissions policy under strict scrutiny, *Grutter* applied a "well-established legal framework for assessing equal protection challenges to express racial classifications." *Parents Involved*, 551 U.S. at 735–36 (plurality opinion). This clearly articulated standard is consistent with this Court's precedents, has been applied predictably by courts since *Grutter*, and remains a workable standard today.

First, universities must identify a compelling interest served by a race-conscious admissions policy. Universities receive limited deference at this step given the "complex educational judgments in an area that lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. This deference is not novel or unfounded. It simply follows this Court's precedents recognizing universities as a "special concern of the First Amendment." *Bakke*, 438 U.S. at 312; *see Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident.").

Grutter also established clear guidelines for evaluating whether a race-conscious admissions policy is narrowly tailored to further a compelling interest. First, universities may not use a quota system or create different admissions paths for different races. *Grutter*, 539 U.S. at 334. The university may only use race as a "plus factor." *Id.* Second, a university may not assign a predetermined point value based on race or ethnicity or make these characteristics the "defining feature" of an application. *Id.* at 337. The university may only consider race in a "flexible,

nonmechanical way" in light of the applicant's other qualities. *Id.* at 334. Third, the university must show no workable race-neutral alternatives exist that achieve the same benefits. *Id.* at 339. The university need not exhaust "every conceivable race-neutral alternative," but it must engage in good faith consideration and periodic review to ensure consideration of race is still necessary. *Id.* at 339, 342. And fourth, the program must not "unduly harm members of any racial group." *Id.* at 341. These guidelines ensure a university conducts a holistic review of each applicant while using race only as needed to achieve a compelling interest. *Id.* at 334.

Post-*Grutter* decisions demonstrate the workability of this standard. In *Gratz*, the university assigned a predetermined point value to every "underrepresented minority applicant," which almost guaranteed acceptance for every minimally qualified underrepresented minority applicant. 539 U.S. at 272. Unlike the policy in *Grutter*, this point system deprived applicants of individualized consideration and was struck down for violating the Equal Protection Clause. *Id.* at 271, 275; *see also Parents Involved*, 551 U.S. at 711, 724 (plurality opinion) (holding school policies unconstitutional when the districts assigned students to schools based on race to maintain a predetermined racial balance). In contrast, the challenged university policy in *Fisher II* considered an applicant's race in addition to several other factors. 579 U.S. at 374–75. Race could impact an applicant's overall score, but the university did not assign a predetermined value or set a goal for how many minority applicants to admit. *Id.* at 375. The university also submitted evidence that proposed race-neutral alternatives did not achieve the same benefits. *Id.* at 385–86. These features demonstrated that the university used race in a narrowly tailored way, and this Court upheld the admissions policy. *Id.* at 388.

These decisions not only show *Grutter* works, but they also provide further guidance to the lower courts. *See, e.g.*, *Students for Fair Admissions, Inc. v. Presidents and Fellows of*

Harvard Coll. ("*Harvard*"), 980 F.3d 157, 185–94 (1st Cir. 2020) (discussing *Grutter* and *Fisher II* in upholding a university's race-conscious admissions policy); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 655–61 (M.D.N.C. 2021) (same). This "evenhanded, predictable, and consistent development of legal principles" is the hallmark of a workable standard. *Payne v, Tennessee*, 501 U.S. 808, 828 (1991); *cf. Ramos*, 140 S. Ct. at 1405 (analyzing consistency and legal developments when deciding whether to revisit precedent). *Grutter* fits seamlessly with this Court's equal protection cases applying strict scrutiny, and this Court should preserve the reliability and consistency provided by this standard.

C. *Grutter* Created Substantial Reliance Interests.

A precedent engenders substantial reliance interests "where advance planning of great precision is most obviously a necessity." *Dobbs*, 142 S. Ct. at 2276 (citation omitted). These reliance interests often take the form of "economic, regulatory, or social" consequences. *Ramos*, 140 S. Ct. at 1406. *Grutter* implicates these interests in almost every corner of society—for students, universities, professional communities, and our system of government. This Court should not create such a severe disruption by overruling *Grutter*.

A prohibition on race-conscious admissions policies would upset the expectations of students who attended universities with the promise of exposure to a diverse learning environment. North Greene's mission statement illustrates this sort of advertisement to prospective students. North Greene strives to "teach a diverse community of . . . students to become the next generation of leaders." R. at 3. And it seeks to diversify its applicant pool through its First Generation Program, Minority Recruitment Program, and Financial Aid Initiative. R. at 14. But as North Greene discovered when considering race-neutral alternatives, it could not achieve the same level of diversity without a race-conscious admissions policy. R. at

15–17. If this Court abandons *Grutter*, minority students who expected to join a diverse academic and social environment may instead find themselves experiencing "loneliness and isolation." *Fisher II*, 579 U.S. at 384.

Universities will similarly face academic and economic disruption if this Court prohibits race-conscious admissions policies. Just as universities relied on Justice Powell's opinion in *Bakke* when designing their admissions programs, universities adjusted their programs after *Grutter*. *See Fisher II*, 579 U.S. at 372–74; *Grutter*, 539 U.S. at 323. These changes included expanding recruiting efforts, hiring new faculty, and creating a new curriculum. R. at 13; Resp't's Br. at 40, *Harvard,* (No. 20-1199) (U.S. filed July 2022). Overruling *Grutter* would force universities to spend resources on adjusting these plans, which in turn could harm enrollment in certain areas of study. Resp't's Br. at 40–41, *Harvard*. This impact would be far-reaching, with some reports indicating over forty percent of universities consider race as a factor in admissions.[1]

The reliance interests at stake also extend to the professional community. The business community, healthcare industry, and military all seek graduates from diverse educational settings.[2] This expansive, cross-industry desire for diverse candidates shows diversity has "become part of our national culture." *Ramos*, 140 S. Ct. at 1406 n.66 (citing *Dickerson v.*

[1] Melissa Clinedinst, *2019 State of College Admission*, National Association for College Admission Counseling, 17 (2019), https://www.nacacnet.org/news--publications/publications/state-of-college-admission/.
[2] *See* R. at 13 (discussing the King Report's finding that businesses desire applicants from a diverse educational setting); Br. for Adm. Charles S. Abbot, et at. as Amici Curiae Supporting Resp't's at 22–28, *Harvard*, (No. 20-1199) (U.S. filed Aug. 1, 2022) (discussing the military's need for a diverse officer corps); Br. for Ass'n Am. Med. Colls. as Amici Curiae Supporting Resp't's at 31–33, *Harvard* (No. 20-1199) (U.S. filed July. 28, 2022) (discussing the declining diversity in the healthcare profession in states that banned race-conscious admissions policies).

United States, 530 U.S. 428, 443 (2000)). Eliminating race-conscious admissions policies would harm these recruiting efforts and prevent universities from developing future leaders. R. at 12.

Lastly, overruling *Grutter* would undermine our federalist system of government. As this Court stated in *Brown*, education is traditionally a state and local matter. 347 U.S. at 493. Currently, nine States have outlawed the use of race in admissions programs.[3] In this respect, states serve as "laboratories for experimentation." *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). This system allows universities to observe how different admissions policies perform and "draw on the most promising aspects." *Grutter*, 539 U.S. at 342. This Court should allow states to maintain this responsibility and continue to respond to the "diverse needs of a heterogenous society." *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

These substantial reliance interests are not undermined by *Grutter*'s hope that race-conscious admissions policies would be unnecessary in twenty-five years. 539 U.S. at 343. This Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Centr. Va. Comm. Coll. v. Katz*, 546 U.S. 356, 363 (2006). *Fisher II* also clarified that universities should conduct periodic reviews of admissions policies and make changes based on the circumstances. 579 U.S. at 379–80. Far from a bright-line ending point, this created a fact-dependent moving target. North Greene—along with many other universities—followed this guidance, and overruling *Grutter* would frustrate these reliance interests.

*****The remainder of this section is omitted. The full brief is available upon request.*****

[3] Collin Binkley, *Supreme Court Takes Up Race in College Admissions*, Associated Press (Jan. 25, 2022), https://apnews.com/article/college-admissions-us-supreme-court-race-and-ethnicity-racial-injustice-harvard-university-95be5363a3245fbf185babe8423426a4.

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Date of BA/BS	**May 2020**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 20, 2023**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**U.C. Davis Asylum & Refugee Law Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 1, 2023

The Honorable Judge Kiyo A. Matsumoto
United States District Court for the New York Eastern District
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

As the former Editor-in-Chief of the flagship publication at the American University Washington College of Law, I am writing to apply for a 2025–2026 clerkship in your chambers. I will take the New York Bar Exam this July, and I will begin my legal career as an associate at the New York office of Ropes & Gray LLP this October.

Research, drafting, editing, advocacy, and leadership consumed the entirety of my law school career. During my first year, I competed for and successfully obtained a spot on the Moot Court Honor Society. Shortly thereafter, I was elected to direct the Weschler First Amendment National Moot Court Competition, hosted by the Washington College of Law in October 2021. I went on to serve as a Research Assistant, Teaching Assistant, and Dean's Writing Fellow. During my time as Dean Fairfax's Research Assistant, I researched and wrote about criminal law and procedure and edited his journal articles, casebooks, and treatises.

When I became Editor-in-Chief of the *American University Law Review* during my second year of law school, the responsibilities began seconds after the congratulatory call concluded. I was thrust into the position while balancing my academic course load, comment writing, Teaching Assistant, and Writing Fellow responsibilities. I was twenty-two when elected, making me the youngest person to ever serve as Editor-in-Chief of the *Law Review*. I was also the first Muslim ever elected to this position. I led a staff of over one hundred students; advocating for such a large group put my analytical skills to the test repeatedly, whether I was communicating with advertisers, authors, sponsors, printing companies, or even the law school administration, which oftentimes included my own professors. My *Law Review* comment was selected for publication just after my second year ended, and it was published during my third year. Serving as both an Editor-in-Chief and author provided me with a multifaceted approach to the editing process; I focused on consistency and author voice while upholding the core tenants of a well-supported legal argument. The position required over two thousand hours, around half of which focused on revising, editing, and Bluebooking articles, forewords, notes, and comments. I exceeded my obligations as Editor-in-Chief while managing my academic courseload, enabling me to graduate *magna cum laude* and receive the American University's Outstanding Graduate Award. When it comes to fulfilling my commitments, I have a simple mantra: breathe, prioritize, and execute.

I am a New York native with the skills required to be an effective judicial clerk, as evidenced by my success in balancing my many law school commitments and responsibilities. I work well under pressure and have both a positive and professional attitude, whether I am working independently or cooperatively. I would be grateful for the opportunity to work in your chambers. Thank you for your time and consideration.

Very Respectfully,

Shahnoor Khan

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EDUCATION

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, Washington, D.C. Aug. 2020–May 2023
Juris Doctor | *magna cum laude* | GPA: 3.82 (Top 10%) | Order of the Coif | Class Rank: 24/311
Law Review: *Editor-in-Chief*, *American University Law Review* | *Law Review Representative*, Joint Journal Committee
Moot Court: *Wechsler National First Amendment Competition Co-Director*, Moot Court Honor Society
Awards: Outstanding Graduate Award | *Highest Grade Designation*, Criminal Law | *Highest Grade Designation*, Legal Drafting: Family Law
Positions: *Teaching Assistant*, Criminal Law | *Dean's Writing Fellow*, Legal Research and Writing Program | *Research Assistant to Professor Rebecca Hamilton*, International Law | *Designated Notetaker*, National Security Law: Surveillance and Secrecy
Activities: *Member*, ADVANCE First Generational Law Students Coalition | *Member*, Asian and Pacific Islanders Law Student Association | *Treasurer*, Muslim Law Students Association | *Member*, Phi Alpha Delta Law Fraternity | *Member*, Women's Law Association
Publication: *Spider-Man: Work from Home and Retain No Copyright Under the Instance and Expense Test*, 72 Am. U. L. Rev. 657 (2022).

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, New Paltz, NY Aug. 2017–May 2020
Bachelor of Arts in International Relations and Political Science | *magna cum laude* | Program Rank: 3rd
Positions: *Research Assistant to Dr. Robin Jacobowitz*, Benjamin Center for Public Policy Initiatives | *Researcher*, United Nations Semester Program | *Peer Academic Advisor*, University Career Resource Center

EXPERIENCE

ROPES & GRAY, LLP, New York, NY
Litigation Associate Incoming Oct. 2023
Summer Associate May 2022–Jul. 2022
- Conducted patent law research and analysis and drafted and presented findings to Intellectual Property practice group.
- Engaged in document review and researched New York law applicable to a contested *pro bono* adoption matter.
- Drafted summary of terms for client engaged in transaction; reviewed due diligence materials for real estate transaction and drafted memorandum summarizing findings; coordinated review of client's intellectual property ownership.

WASHINGTON COLLEGE OF LAW, OFFICE OF THE DEAN, Washington, D.C.
Research Assistant to Dean Roger Fairfax, Jr. May 2022–May 2023
- Conducted research and drafted analytical memoranda on criminal law and procedure for casebook and journal articles.

UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.
Legal Extern, **Office of Legal Policy** Aug. 2021–Dec. 2021
- Completed vetting assignments for federal judges prior to their nomination.
- Performed research and analysis regarding Violence Against Women Act and drafted death penalty-related proposals.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, New York, NY
Legal Intern, **Field Operations at the Transportation Security Administration** May 2021–Aug. 2021
- Conducted Fourth Amendment research and analysis related to DHS policy and standard operating procedures.
- Analyzed transportation and national security incidents at federal checkpoints, searching for trends and potential threats.
- Reviewed potential civil enforcement remedies and advised on remedies appropriate to ongoing matters.

VARSITY TUTORS, Virtual
LSAT Instructor/Law School and Graduate School Admissions Counselor May 2020–May 2021

SUNY NEW PALTZ, OFFICE OF CAMPUS SUSTAINABILITY, New Paltz, NY
Leader of the Sustainability Implementation Team June 2019–May 2020
- Oversaw implementation of UN Sustainable Development Goals, coordinating with neighboring towns and state offices.

ADDITIONAL INFORMATION

Languages: Urdu (conversant), Hindi (conversant), and French (beginner).
Interests: basketball, boxing, photography, and stand-up comedy.

KHAN SHAHNOOR K 4431138 11/19

05/28/23 1 OF 1

FALL 2020

LAW-501	CIVIL PROCEDURE	04.00	A-	14.80
LAW-504	CONTRACTS	04.00	A-	14.80
LAW-516	LEGAL RHETORIC I RESEARCH & WRITING I	02.00	B+	06.60
LAW-522	TORTS	04.00	B+	13.20

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 49.40QP 3.52GPA

SPRING 2021

LAW-503	CONSTITUTIONAL LAW	04.00	A	16.00
LAW-507	CRIMINAL LAW	03.00	A	12.00
LAW-517	LEGAL RESEARCH & WRITING II RESEARCH & WRITING II	02.00	A	08.00
LAW-518	PROPERTY	04.00	A-	14.80
LAW-550	LEGAL ETHICS	02.00	A-	07.40

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 58.20QP 3.88GPA

FALL 2021

LAW-508	CRIMINAL PROCEDURE I	03.00	A	12.00
LAW-635	NATIONAL SECURITY LAW	02.00	A	08.00
LAW-769	EXTERNSHIP SEMINAR	02.00	A	08.00
LAW-803FA	MOOT COURT EXECUTIVE BOARD	01.00	P	00.00
LAW-847	APPELLATE ADVOCACY	03.00	A	12.00
LAW-899	EXTERNSHIP FIELDWORK	03.00	P	00.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 40.00QP 4.00GPA

SPRING 2022

LAW-633	EVIDENCE	04.00	A	16.00
LAW-719B1	FALSE CLAIMS IN HEALTHCARE IND	01.00	A	04.00
LAW-795CI	CONGRESSIONAL INVESTIGATIONS	01.00	A	04.00
LAW-796S	LAW REVIEW I	02.00	P	00.00
LAW-849C	LEGAL DRAFTING: CORPORATE	02.00	A-	07.40
LAW-871SC	MOOT COURT COMPETITION	02.00	P	00.00
LAW-962A	LICENSING INTELLECTUAL PROP.	03.00	A-	11.10

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 42.50QP 3.86GPA

FALL 2022

LAW-642	ENTERTAINMENT LAW	03.00	A-	11.10
LAW-651	LAWYER BARGAINING	03.00	A	12.00
LAW-680	AMERICAN POLITICAL PROCESS	03.00	B+	09.90
LAW-849A	LEGAL DRAFTING: CONTRACTS	02.00	A	08.00
LAW-896	LAW AND THE VISUAL ARTS	02.00	A	08.00

LAW SEM SUM: 13.00HRS ATT 13.00HRS ERND 49.00QP 3.76GPA

SPRING 2023

LAW-650	INTERVIEWING AND COUNSELING	03.00	A	12.00
LAW-749	WHITE COLLAR CRIME	03.00	A	12.00
LAW-793	ADVANCED LEGAL ANALYSIS	03.00	A	12.00
LAW-798S	LAW REVIEW EDITORIAL BOARD	04.00	P	00.00
LAW-849B	LEGAL DRAFTING: FAMILY LAW	03.00	A	12.00

LAW SEM SUM: 16.00HRS ATT 16.00HRS ERND 48.00QP 4.00GPA

DEGREE AWARDED:
JURIS DOCTOR

DEGREE DATE:
05/20/23

HONORS:
MAGNA CUM LAUDE

JD CUM SUM: 87.00HRS ATT 87.00HRS ERND 287.10QP 3.82GPA

END OF TRANSCRIPT

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FALL 2020

- LAW-501-003: Civil Procedure with Professor Elizabeth Earle Beske
  - Grade: A-
- LAW-504-003: Contracts with Professor David H. Spratt
  - Grade: A-
- LAW-516-019: Legal Research and Writing I with Professor Paul Figley
  - Grade: B+
- LAW-522-003: Torts with Professor Amanda Leiter
  - Grade: B+

SPRING 2021

- LAW-503-003: Constitutional Law with Professor Lia Epperson
  - Grade: A
- LAW-507-003: Criminal Law with Professor Rebecca Hamilton
  - Grade: A, awarded Highest Grade Designation
- LAW-517-019: Legal Research and Writing II with Professor Paul Figley
  - Grade: A
- LAW-518-003: Property with Professor Brandon Weiss
  - Grade: A-
- LAW-550-006: Legal Ethics with Susan Franck
  - Grade: A-

FALL 2021

- LAW-508-004: Criminal Procedure I with Professor Angela Davis
  - Grade: A
- LAW-635-001: National Security Law with Alex Joel
  - Grade: A
- LAW-769-001: Externship Seminar
  - Grade: A
- LAW-847-001: Appellate Advocacy
  - Grade: A

SPRING 2022

- LAW-633-001: Evidence with Professor Andrew Gurthie Ferguson
  - Grade: A
- LAW-719B1-001: False Claims in the Healthcare Industry with Professor Erica Krauss
  - Grade: A
- LAW-795CI-E001: Congressional Investigations with Professor Rachit Choksi
  - Grade: A
- LAW-849C-E001: Legal Drafting: Corporate with Professor Mark Dunham
  - Grade: A-
- LAW-962A-001: Licensing Intellectual Property with Professor Pamela Deese
  - Grade: A-

LAW SCHOOL COURSES WITH GRADES AND PROFESSOR NAMES (CONT.)

FALL 2022

- LAW-642-001: Entertainment Law with Professor Douglas Baldridge
  - Grade: A-
- LAW-651-002: Lawyer Bargaining with Professor Martin Mitchell
  - Grade: A
- LAW-680-001: American Political Process with Kimberly Wehle
  - Grade: B+
- LAW-849A-001: Legal Drafting: Contracts with Professor Richard Pollack
  - Grade: A
- LAW-896-001: Law and the Visual Arts with Professor Molly Stetch
  - Grade: A

SPRING 2023

- LAW-650-001: Interviewing and Counseling with Professor Marissa Hill Daley
  - Grade: A
- LAW-749-001: White Collar Crime with Professor Tracee Plowell
  - Grade: A
- LAW-793-E004: Advanced Legal Analysis with Professor Megan Lee
  - Grade: A
- LAW-849B-001: Legal Drafting: Family Law with Professor David H. Spratt
  - Grade: A
  - Highest Grade Designation